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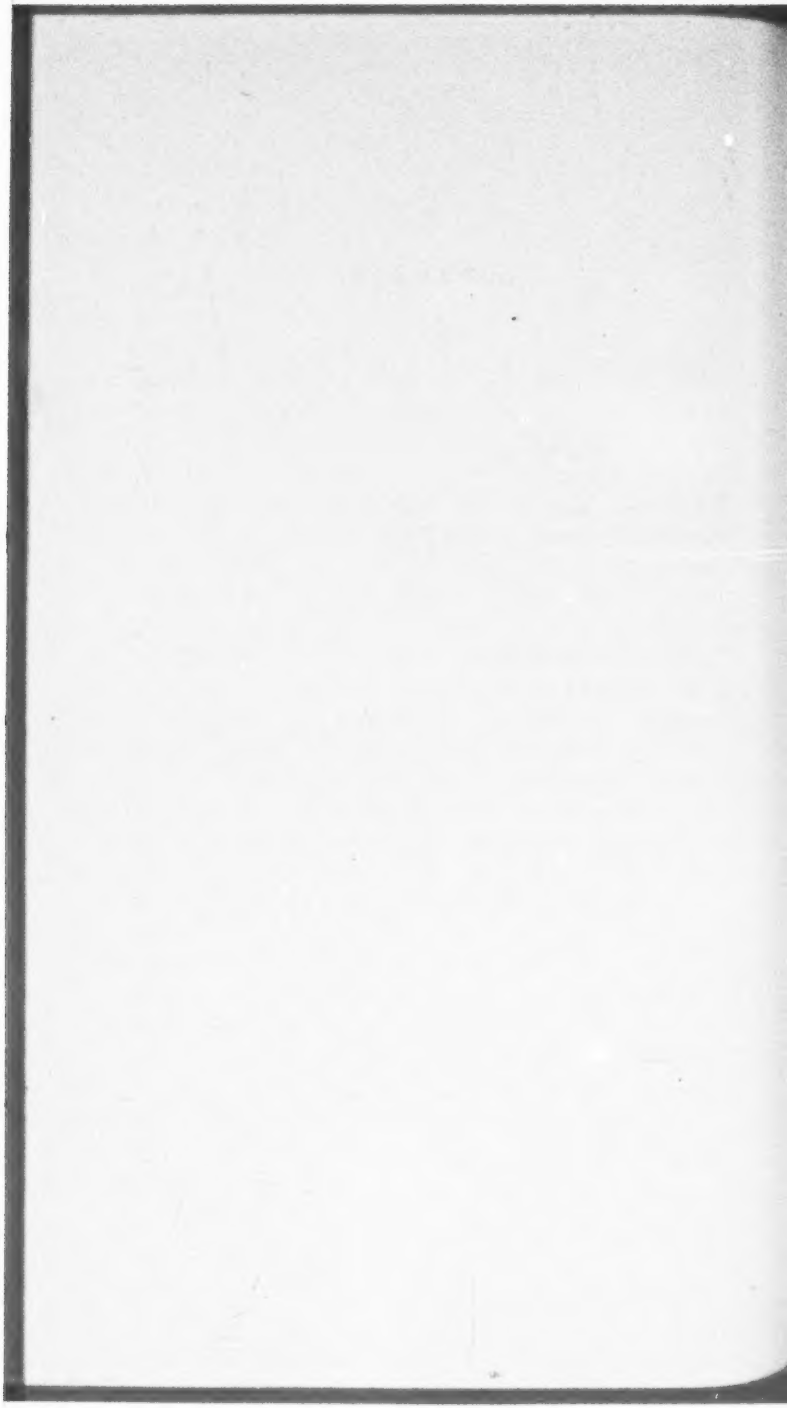

IN THE

# Supreme Court of the United States,

No. 568 OF OCTOBER TERM, 1895.

CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

*against*

AARON R. STEVENS and others,
Defendants in Error.

On Motion to Dismiss or Affirm.

## FOR THE DEFENDANTS IN ERROR.

### STATEMENT OF THE CASE.

**FIRST HEAD: This Motion.**

This is a motion to dismiss the writ of error upon the ground that no Federal question is involved, and also to affirm the judgment below, for the reasons permitted by the rule.

The motion is made by the defendants in error, The Lebanon Springs Railroad (a New York corporation), Stevens, Rogers, Wilbur, Douglas and Harrison. All of these but the Lebanon Springs Railroad were the plaintiffs in the trial Court. The Lebanon Springs Railroad first came into the action in the Court of Appeals of New York, *claiming to*

*have acquired by purchase the entire interest of the plaintiffs in error.*

The case was tried to the Court without a jury, and the trial Court, according to the practice then in use in New York, found the facts and the law separately, and these findings are set out in the judgment.

As the assignment of errors does not raise any question but what the findings of fact are in accord with the evidence, and also does not raise any question that there was evidence tending to prove other facts which should have been found, but were not found, it follows that the findings of fact are both complete and incontestible. The evidence has therefore not been printed upon this motion.

The assignment of errors does not raise any question but what the judgment has wholly disposed of all the issues made by the pleadings. The pleadings, which consist of one hundred and forty-three printed pages, have therefore not been reprinted.

It is submitted that the judgment, together with the records of such events as have happened since, will intelligibly present all the questions.

**SECOND HEAD: The Writ of Error and the Judgments below.**

The writ of error brings up a judgment of the Court of Appeals of New York which had affirmed a judgment of the General Term of the Supreme Court of New York for the Third Department, which latter judgment had before that affirmed a judgment of the Saratoga Special Term of the Supreme Court of New York—the trial Court in this case.

**THIRD HEAD: Facts in summary.**

The plaintiffs were owners of some of the bonds secured by a first mortgage which the Lebanon

Springs Railroad Company, a New York corporation, had made upon its railroad to the Union Trust Company of New York as trustee. Default having been made in the payment of interest, the Union Trust Company brought an action to foreclose the mortgage, got a judgment of foreclosure and sale, sold, took the cheque of the purchaser for the purchase money, locked the cheque up in its vaults, never presented it for payment but has got it yet, had a deed of the railroad given by the Court officer to the purchaser's clerk, and put the purchaser in possession. The clerk then made, without any consideration, a mortgage to the purchaser for five millions of dollars, and, subject to that mortgage, conveyed the railroad, also for no consideration, to the New York, Boston and Montreal Railway Company, which was going to make a grand trunk line between New York and Montreal. The latter company promptly mortgaged the railroad to secure bonds to the amount of twenty-five millions of dollars; sold enough of them in France to realize six millions of dollars, and paid the purchaser out of it eight hundred and six thousand dollars.

They leased the railroad to the Central Vermont Railroad Company, which began operating it, and then both the purchaser and the New York, Boston and Montreal Railway Company failed, a receiver of the property of the latter was appointed, and already the assets had passed out of his hands, when the Central Vermont Co., having by the foreclosure of mortgage on another road lost its means of access to this railroad, abandoned it. It was directly taken possession of by a person who is supposed to have had some large property interests, but who, in the eye of the law, was a simple trespasser. He operated the road about a month, and then began the matters out of which the present questions arise.

One Sackett, who claimed to own $8,700 of the bonds secured by the mortgage to the Union Trust Company, brought a suit in the Supreme Court of New York against the New York, Boston and Montreal Railroad Company, its receiver, and the trespasser—*nobody else*. He alleged in his complaint that he brought it in behalf of all the other bondholders—the amount was two millions of dollars—as well as himself. He alleged the above given facts, including the non-payment of the purchase money, but made nobody concerned in that matter a party. The Railway Company and its receiver made default, as was expected. The trespasser put in an answer, but as he could allege nothing showing any right in himself, Sackett moved for a receiver and got one who took possession of the road. Having then successfully opposed two applications of other bondholders to get into the case, Sackett had his receiver make certificates to the amount of three hundred and fifty thousand dollars, which they sold for $236,500, and no more. Of this they divided up among themselves $115,807.04. What became of the rest does not appear—and then Sackett abandoned the action.

Four years afterwards $250,000 of the certificates having come into the possession of the Central National Bank of Boston,

(It took them for a precedent and bad debt of the failed Pacific National Bank.)

it forced the case to a trial, which took place between itself and the receiver, and, as a result, they entered a regular judgment, which adjudged a sale of the railroad, subject to the principal of the receiver's certificates, which the purchaser was to assume and pay. The sale was made to Foster for $155,000, the whole of which was absorbed in paying the debts of the receivership.

The trial Court has found as a fact in regard to

all of the proceedings in this action, as the result of a quantity of facts there given in detail, which in this summary are omitted, that it was not brought for the benefit of the other bondholders, but that it was brought to realize to Sackett and his associates certain claims which, if valid, were behind the mortgage.

Shortly afterwards the principal of the certificates coming due, and not being paid, the Central National Bank of Boston brought an action in the Supreme Court of New York, on behalf of itself and all the other certificate-holders, against Foster and a railroad company to which he had conveyed the railroad. This action the defendants moved into the Circuit Court of the United States, and there the complainant got a decree declaring the certificates to be a first lien on the railroad *in the hands of Foster and anybody claiming under him;* for a sale of the railroad and a decree against Foster for any deficiency.

Now comes this action.

The plaintiffs were original bondholders. They brought their action against

1. The Union Trust Company—the trustee.
2. The purchaser who gave his cheque, but did not pay it, and his clerk, the grantee at the foreclosure sale.
3. The New York, Boston and Montreal Railway Company, its receiver, and the trustees of its mortgages.
4. All the certificate-holders (plaintiffs in error here).
5. Foster and his railroad.

The action finally came to judgment.

(The road has been in the possession of a Receiver appointed in this action ever since March, 1887.)

The judgment finds the Sackett suit to be tainted with fraud in fact and wholly ineffectual, because having in it no parties who had any interest in the property. It sustained the complaint as a bill of review and reviewed and reversed the judgment and all the proceedings in that suit; specially vacated the order for the issue of the certificates, the sale and the referee's deed to Foster; it then sweeps away everything since the judgment in the original foreclosure action, under which was the sale upon which the purchaser gave his cheque which he did not pay; adjudges that that judgment be enforced and that the road be resold, giving equitable directions for the distribution of the purchase money.

At this time an advertisement for the sale under the decree of the Circuit Court of the United States in the action of the Central National Bank (into which all the other plaintiffs in error had come) was running. The judgment therefore enjoined all certificate-holders who were parties—*i. e.*, the plaintiffs in error—from proceeding with that sale and from suffering it to proceed in their names or behalf.

This is supposed to present the Federal question.

Thereupon Mr. Peter Butler, one of the certificate-holders, applied to Judge Wallace for instructions, and Judge Wallace ordered the Master to proceed with the sale, notwithstanding the injunction. He did so, and Foster bought, paid his money, got his deed—the sale was confirmed and Foster conveyed to the Lebanon Springs Railroad, a new corporation, one of the defendants in error.

The plaintiffs in error—certificate-holders—appealed from the judgment in this action to the General Term, which affirmed the judgment. They then appealed to the Court of Appeals, where the Lebanon Springs Railroad also appeared, and on proof of its deeds claimed to own all the interest

of the appellants, and prayed for the affirmance of the judgment. It was affirmed.

Directly after the sale under the decree of the United States Court the plaintiffs below brought two proceedings in the Supreme Court of New York, the one to punish Mr. Peter Butler and the other to punish all the other plaintiffs in error for the violation of the injunction in permitting the sale to go on. The proceedings have been terminated in favor of the plaintiffs in error, in the former on the suggestion of the death of Mr. Peter Butler; in the latter on the finding of fact that none of the other plaintiffs in error did violate the injunction.

The plaintiffs in error now say that there is a Federal question, because we got an injunction enjoining a judgment of the United States Court.

To this we answer:

1. That there is no Federal question because we got no such injunction.

2. That if we had, they cannot raise the question, because they sold, notwithstanding the injunction, got all the benefit of their decree, and have also parted with all their interest in the property, which is now owned by the Lebanon Springs Railroad, defendant in error, here in court asking the affirmance of the judgment.

3. That they cannot raise the question by virtue of being in peril of contempt, because it has been judicially and finally determined that they are not in contempt.

The above is a rough and incomplete statement of the main facts. A statement accurate and in detail now follows:

**FOURTH HEAD: Facts in detail.**

I.

*Facts prior to the Sackett suit, found in the judgment.*

The plaintiffs below were owners of bonds issued by the Lebanon Springs Railroad Company, and also of bonds issued by the Harlem Extension Railroad Company. Each of these classes of bonds was secured by a mortgage made to the Union Trust Company of New York as trustee.

The Union Trust Company was made a defendant, and thus the action is, in contemplation of law, the same as if it had been brought by the Union Trust Company itself as sole plaintiff (57 Hun, 511, top of page).

The Lebanon Springs Railroad Company was incorporated under the laws of New York, with many valuable powers, among others, the power to extend its lines into Vermont and Massachusetts. It constructed a railroad extending from Chatham, New York, to Bennington, Vermont, and at the time when the transactions to be spoken of begin it owned that railroad and was operating it.

On the first of July, 1867, it issued its bonds to the total amount of two millions of dollars, and to secure their payment it made a mortgage to the defendant, the Union Trust Company of New York.

On the ninth of February, 1870, the Lebanon Springs Railroad Company consolidated with the Bennington and Rutland Railroad Company, whose railroad continued the line of the Lebanon Springs northwardly into Vermont, and thus was formed a new company called the Harlem Extension Railroad Company,

This last company on the first of April, 1870, issued bonds to the amount of one million and a

half of dollars and to secure them made a mortgage to the same company, the Union Trust Company, as trustee, conveying all its property and franchises, including, of course, all the property and franchises of both constituent companies.

The plaintiffs below own *both* kinds of bonds.

Default was made upon both kinds of bonds in 1870 and nothing has ever been paid since upon either issue.

In February, 1872, the Union Trust Company brought an action in the Supreme Court of New York to foreclose so much of the Lebanon Springs mortgage as related to the railroad in New York, and it filed two bills in the Court of Chancery of Vermont to foreclose so much of the Lebanon Springs and Harlem Extension mortgages, respectively, as related to the railroad in Vermont. The Harlem Extension Company was, necessarily, and was, in fact, a party to all three suits.

Judgment in the action in the Supreme Court of New York was got 10th December, 1872, and decrees in the two actions in Vermont were got 6th December, 1872. One of the decrees is printed at page 20 and the judgment at page 16. In strict conformity with the provisions of the mortgage, *it directs the payment of the purchase money to the plaintiff, the Union Trust Company* (fol. 68).

Pending advertisements of sale under the decrees, as well as the judgment, the Harlem Extension Railroad Company was, with a lot of other companies, whose roads, if constructed, would have extended its line southerly to New York, consolidated into a new corporation called the New York, Boston and Montreal Railway Company, which is a defendant in this action. This consolidation was 19th December, 1872.

Under the decrees in Vermont sales were made on the 20th January, 1873, to Trenor W. Park for $50,000 (25,000 in each case), and by direction of Park deeds were made by the Master to Charles G. Lincoln, who was in Mr. Park's employ, but *no part of the purchase money was ever paid* (fol. 103). The deeds were recorded two days afterward, 22d January, 1873.

Under the judgment in New York sale was made on the 25th January, 1873, to the defendant, William Butler Duncan, for one hundred thousand dollars. By direction of Duncan the referee made a deed to the defendant Hull, who was in Mr. Duncan's employ. Both Mr. Duncan's banking firm and himself failed within the following year, and no part of the purchase price upon that sale has ever been paid (fol. 103). This deed also was immediately recorded (fol. 103).

The Union Trust Company is a defendant in this action.

Three days after Hull got his deed, Hull and Lincoln, without any consideration, made a bond to Park and Duncan for *five millions* of dollars, payable August 1st, 1873, with interest, and to secure its payment they made a mortgage upon all the property under both deeds in both States. This mortgage was recorded in New York 14th February, 1873, and in Vermont 1st May, 1873 (fol. 104).

Two days afterward—30th January—Hull and Lincoln, by separate deeds, conveyed all the property to the New York, Boston and Montreal Railway Company, subject, however, to the five million mortgage, which they had given to Park and Duncan. These deeds were immediately recorded.

The New York, Boston and Montreal Railway Company then mortgaged the whole of the property and franchises to Brown, Seligman and Sherman,

defendants below, to secure bonds to the amount of twelve millions two hundred and fifty thousand dollars, and another mortgage to the New York Loan and Indemnity Company (whose surviving trustees are parties here) to secure bonds to the amount of twelve millions seven hundred and fifty thousand dollars. These mortgages were recorded in 1873, and enough of the bonds were sold abroad to realize *six millions* of dollars in cash, out of which Brown and Seligman, who received the money, paid to Duncan and Park $807,077.05 on the five million mortgage which had been given by Hull and Lincoln (fol. 112).

Next the New York, Boston and Montreal Railway Company failed, and a receiver of its property was appointed as early as April, 1875, and the active existence of both ceased during that year. They are parties to this action, but have made default.

Meanwhile the road had been leased to the Central Vermont Company, which operated it until the last of August, 1877. It was then taken possession of by the defendant Root, who organized under the manufacturing law of New York the corporation defendant called the Harlem Extension Railroad South Coal Transportation Company. Root was technically a simple trespasser. He had been interested in the Lebanon Springs Company from the beginning; was one of its directors and its secretary, and of course a stockholder, and is supposed to have had other property interests, but he had nothing which gave him a right to the possession of the road, and of course the Harlem Extension Railroad South Coal Transportation Company had no right at all. Root continued to operate the road in the name of that company, running regular trains, until the possession was taken from him by the Court.

## II.

## The Sackett Suit.

1. The trial Court found the following facts in the following words and figures:

Italics are ours of course.

"On the seventh September, 1880, one Marvin 'Sackett, who claimed to be the owner of bonds "issued by said Lebanon Springs Railroad Com- "pany to the amount of $8,700, brought an action "in this court against the said Russell C. Root "and the said Harlem Extension Railroad South "Coal Transportation Company, and also against "the said New York, Boston and Montreal Rail- "way Company and against the said Daniel But- 'terfield as its receiver.

"In his complaint he alleged that he brought the "action 'in behalf of himself and all others, bond- "'holders of the Lebanon Springs Railroad Com- "'pany, similarly situated, who hold any of the "'two millions of dollars of the bonds of the "'Lebanon Springs Railroad Company, herein- "'after referred to, and who shall be entitled to "'avail themselves of the benefit of the suit.' He "prayed for the sale of the whole of the said rail- "road property and franchises.

"He alleged in his complaint the fact of the "mortgage to secure his bonds, among others, to "the Union Trust Company of New York, its ac- "tions to foreclose, the sale under it, and the non- "payment of the purchase money.

"He did not make the Union Trust Company of "New York a party to the action.

"He alleged in his complaint the aforesaid sales "to Hull and Lincoln and their mortgage to Park

" and Duncan as aforesaid, and their conveyance " to the New York, Boston and Montreal Rail- " way Company as aforesaid. And that Hull and " Lincoln and Park and Duncan acted throughout " all those matters as the 'agents' and the 'repre- " sentatives,' and 'for the use and benefit' and for " the 'sole benefit and advantage' of the Lebanon " Springs bondholders; and that the mortgage " was given to Duncan and Park 'for' those bond- " holders, and that Park and Duncan held the " property as 'trustees' for those bondholders. He " did not make either Park or Duncan, or Hull or " Lincoln parties to the action. He did not make " any of the trustees under the two mortgages for " twenty-five millions of dollars parties to the ac- " tion, nor the trustees of the aforesaid mortgage of " the Harlem Extension Railroad Company.

" The summons and complaint in that action " were served upon the New York, Boston and " Montreal Railway Company 7th September, 1880, " and upon Daniel Butterfield as such Receiver, " 23d September, 1880. They both made default " and have never done anything.

" The summons and complaint were served upon " Russell C. Root and the Harlem Extension Rail- " road South Coal Transportation Company 7th " September, 1880. They put in joint answers " 25th September, 1880, which are in evidence.

" The plaintiff did not bring the action to trial " until the tenth of October, one thousand eight " hundred and eighty-*four*.

" He proceeded as follows:

" On the first of October, 1880, he moved for the " appointment of a Receiver, which motion, being " opposed by nobody, was granted, and John Van " Valkenburgh was appointed.

" This order was filed 7th October, 1880, and " Van Valkenburgh's bond was filed 11th October, " 1880. On the twentieth October, 1880, Root and " the Harlem Extension Railroad South Coal " Transportation Company abandoned the road. " On the twenty-fifth October, 1880, Van Valken- " burgh proceeded to borrow twenty-five thousand " dollars without giving any notice to anybody. " On the twelfth November, 1880, one Bloodgood " and six others claiming to own a majority of the " Lebanon Springs bonds, and who did own more " than three hundred thousand dollars of the same, " noticed a motion to be made parties to the action. " This motion was heard on the 27th November, " 1880, *and was opposed by the plaintiff and de-* " *nied.* The decision was made on the 28th De- " cember, 1880; an order was made and entered " on the tenth of January, 1881. The order denied " the motion, and directed the plaintiff to serve " copies of all papers and notices of every kind on " one F. L. Westbrook, who by the order was " authorized and allowed to appear as counsel *in* " *behalf of the said Bloodgood and the other six* " *bondholders who had joined in the petition* " ' upon all trials, hearings and motions.'

" *Said Westbrook finally declined to act, and so* " *finally declined before the hearing upon the* " *order for certificates of 2d April, 1881.*

" On or about the sixth November, 1880, said " Park and Duncan made an application to the " Court to be made parties to the action. They " alleged that they were the owners of over $300,- " 000 of Lebanon Springs bonds and over $600,- " 000 of Harlem Extension bonds, and that they " were the mortgagee under the mortgage made " by Hull and Lincoln, which the complaint al- " leged they held as trustees for the Lebanon

" Springs bondholders. The application for the " granting of this petition was *opposed by the* " *plaintiff*, was heard on the 27th November and " 10th December, 1880, and *was not granted.*

" *One Henry A. Tilden, who claimed to own* " *thirty Lebanon Springs bonds, was associated* " *with the said Sackett in the bringing of the* " *action. He retained the Hon. Hamilton Harris* " *as counsel therein, and assumed to control the* " *action.*

" The application of Bloodgood and the six " others was ended on the tenth January, 1881. " On the 23d February, 1881, the Receiver verified " a petition to the Court in form for instructions, " but with a suggestion that he issue certificates to " be made a first lien for, among other things, the " ' *settlement of unavoidable indebtedness of the* " ' *company now existing.*' He noticed this peti- " tion for hearing for the 4th March, 1881.

" On the 5th March, 1881, the plaintiff not ap- " pearing, an order was made appointing one Jones " an expert to examine the railroad. Said Jones " made his report 19th March, 1881. On the 2d " April, 1881, the report of the said Jones was " presented to the Court by the Receiver, when, " after hearing two counsel for the Receiver, and " nobody else appearing, the Receiver was ordered " to issue certificates of indebtedness to the amount " of $350,000, to bear interest at six per cent. and " to be a first lien upon the property. The order " also appointed one Strait referee to ' hear and " ' determine *all existing claims* against said Leb- " ' anon Springs Railroad Company.' " " This " order was filed 4th April, 1881.

" The Receiver got his first money on the 10th " May, 1881. *On the 20th April, 1881, the plaintiff,*

" *Sackett*, prepared a petition in which he says he " was '*obliged to collect, classify and arrange all* " '*the complication of facts and place them in* " '*the hands of his counsel for the purposes of* " '*preparation to bring the said action*,' and he " asked for $796.80 for himself and something for " his counsel. This was presented to the Court on " the 28th April, 1881, with notice to the Receiver. " *And the Court ordered the Receiver to pay the* " *plaintiff, Sackett, $796.80, and to pay the plain-* " *tiff's attorneys $1,200.*

" On the 18th May, 1881, one Andrews, who had " been one of the Receiver's counsel upon the ap- " plication for the order for the certificates 2d " April, 1881, presented a petition asking pay for " his services. This was presented to the Court on " the 20th May, 1881, and the Court ordered the " Receiver to pay said Andrews $900. On the " sixth of June, 1881, the Receiver presented a " petition to the Court praying for his compensa- " tion, and the Court made an order allowing him " five per cent. upon all sums received and dis- " bursed.

" On the 28th June, 1881, one Carpenter, ap- " pearing by the attorneys for the plaintiff, Sackett, " presented a claim to the Referee, Strait, for " $358.75 for ' services rendered at the special in- " ' stance and request of the said Lebanon Springs " ' Railroad Company.' The Referee gave him " judgment for that sum.

" *On the 28th June, 1881, the plaintiff, Sackett,* " *presented another claim to the Referee, Strait,* " *for $2,222.34 and interest for services rendered* " ' *at the special instance and request of the said* " ' *The Lebanon Springs Railroad Company.*' " *This claim the Referee, on the 30th June, 1881,* " *allowed at $3,000.04.*

" One Wm. F. Taylor presented a claim against " the Lebanon Springs Railroad Company to the " Referee, Strait, who allowed it at $2,500.

" On the 20th June, 1881, *the said Henry A.* " *Tilden presented, through the attorneys for the* " *plaintiff, Sackett, a claim for $23,967.37 against* " *the former Lebanon Springs Railroad Com-* " *pany for moneys expended at its request, after* " *the making of $2,000,000 mortgage. This claim* " *the Referee allowed on the 5th July, 1881, at the* " *whole amount.*

" From this time forward none of the defend- " ants ever appear to do anything in the action. " *And the plaintiff does nothing until the 23d* " *September, 1884.*

" On the 23d September, 1884, plaintiff's at- " torneys noticed the case for trial for the tenth " of October, 1884. On the tenth of October, " 1884, a trial was had between the counsel " for plaintiff, counsel for the Central National " Bank of Boston" (which was then and is still the largest holder of Van Valkenburgh's certificates), and for certain other holders of certificates who are now parties to this action, " and the " Hon. Hamilton Harris, who had been retained by " the said Henry A. Tilden for the plaintiff, and " had also received from the said F. L. Westbrook " authority to represent him.

" As a result the Court found among other things " that Hull and Lincoln held the title as trustees " for the bondholders, although neither was a party " to the action, and judgment was rendered direct- " ing the sale of all the railroad and property in New " York, subject to the principal of the receiver's " certificates, and directing the purchase money to " be applied in payment, first, of certain counsel

"fees and expenses of the receivership, and next, "the interest due on the receiver's certificates, and "directing any balance to be paid into Court.

"This was entered 27th January, 1885. The "Referee, after adjourning the sale three times, "sold to the defendant Foster, as Trustee, for "$155,000. This amount of $155,000 had been "made up by the receiver on the 2d June, 1885, "and was composed of the following items: Coun- "sel fees, $27,299.21; Interest on certificates, "$64,156.66; Receiver's commissions, $15,851.56; "taxes, $2,290.55, and debts of the receivership "the balance."

The Court also found as facts:

"That the Receiver Van Valkenburgh received "from the certificates two hundred and thirty-six "thousand five hundred dollars and no more." (Fol. 149.)

That the Receiver Van Valkenburgh paid $113,807.04 in claims to the plaintiff and his associates, counsel fees, interest on certificates, and himself. (Fol. 151.)

The Court also found as facts:

"*That the suit of* Sackett against Root *was* "*neither brought nor conducted for the purpose* "*of realizing the property to the owners of the* "*said Lebanon Springs bonds.*

"*That it was brought and conducted for the* "*purpose of realizing out of the property certain* "*individual claims of the said Sackett and Tilden,* "*in preference of and at the expense of the other* "*Lebanon Springs bondholders, which claims, if* "*valid, were not liens upon the property and were* "*behind the mortgage.*" (Fols. 151–2.)

The trial Court also found that certain persons, named in the finding, owning bonds to

the aggregate of twelve hundred thousand dollars were represented in the Sackett suit. Of these persons one Edward Crane had bonds for seven hundred thousand dollars, and the Receiver, Van Valkenburgh, had a large amount.

None of the persons who are thus found to have been represented in the Sackett suit are parties to this action, and none of them had then had their day in Court, *and accordingly the Court directed that this finding should not conclude them, and ordered a reference to ascertain which and how many of the bonds were actually represented in Sackett's suit.*

The result of that reference was to find the aggregate about $225,000.

## III.

## The suit of the Central National Bank of Boston in the Circuit Court of the United States.

Foster and Hazard became the purchasers at the sale, under the judgment in the Sackett suit.

In 1886 the Central National Bank of Boston, one of the plaintiffs in error, on behalf of itself and all other holders of the certificates issued by Van Valkenburgh, brought an action in the Supreme Court of New York against Foster, Hazard and the New York, Rutland and Montreal Railway Company, their grantee, and the American Loan and Trust Company, to which the latter railway company had given a

mortgage, and no others. The complaint set out the giving of the certificates; the sale subject to them to Foster and Hazard, and the personal assumption of their payment by the latter; and it prayed a sale of the railroad and a judgment over against Foster and Hazard for a deficiency. The defendants answered, not denying their liability, but denying that there was as much due on the certificates as was claimed in the complaint.

See the pleadings printed (fols. 16-89).

The defendants in that action, *not* the Central Bank, then moved the case into the Circuit Court of the United States for the Northern District of New York, where a decree resulted, which *first*

See the removal papers printed (fols. 91-106).

declared the certificates to be a lien upon the railroad "in the hands of the defendants herein, and "of any persons claiming through or under the "defendants Rowland N. Hazard and William "Foster, Jr., the purchasers of said premises and "property, at a sale thereof made under and in pur-"suance of the judgment rendered in said action" (Sacket suit) "in said Supreme Court" (of New York) "on or about the twelfth day of January, 1885."

*Secondly*, decreed a reference to William Lansing, Master, to report who, other than the Central Bank, were the holders of the certificates;

*Third*, decreed a sale of the railroad by Frothingham, referee, and

*Fourth*, made a decree over against Foster and Hazard for any deficiency.

See the decree printed (fol. 107).

Upon the reference before the Master all the plaintiffs in error, other than the Central National

Bank, came into the action and proved their certificates under the decree.

See his report, made 7 February, 1888 (fol. 124).

Under this decree a sale had been advertised, but not as yet made, when the judgment below was rendered.

This is the sale which the plaintiffs in error were, by the judgment below, enjoined from proceeding with.

## IV.

## This Action.

It was brought March, 1887, within a few months after the termination of the Sackett suit.

The plaintiffs below were the owners of both kinds of bonds—Lebanon Springs and Harlem Extension—and two of them had had theirs ever since 1867.

All persons were made parties, including

1. The Union Trust Company.
2. The owners of the five-million mortgage, being Park's administrator, Duncan and Duncan's assignee.
3. The New York, Boston and Montreal Railway Company, its receiver, and the trustees of the mortgages under which the bonds were sold in France.
4. Sackett and all the parties to his suit.
5. All the certificate holders—plaintiffs in error here.
6. Hazard and Foster, their railroad company, and its mortgagee; thus, of course, including all the parties to the Central Bank's suit in the Circuit Court of the United States.

All of these parties put in answers (fols. 9–13), and fought the case until the judgment of the General Term of the Supreme Court, beyond which the facts could not be questioned. The certificate holders—plaintiffs in in error here—alone took the case to the Court of Appeals.

The issues thus framed in the action having been tried, the Court found the facts above given, and among its conclusions of law from those facts, it found in regard to the Sackett suit as follows:

"4. That the action brought in this Court by "Marvin Sackett was not a representative action, "for the reason, *first*, that it was not so in fact, "nor intended to be, and *second*, because the "Union Trust Company was not made a party; "and inasmuch as upon the face of the records of "this court it professes to be the action of these "plaintiffs and all other owners of Lebanon "Springs bonds, and to sell and dispose of all their "interest and that of the Union Trust Company "in the property and franchises, the plaintiffs and "all the other holders of such bonds and the "Union Trust Company are now entitled to have "the judgment and all the proceedings in that "suit, incluing the sale and the deed by the Ref-"eree to the defendants Foster and Hazard, re-"viewed and reversed" (fols. 156–8).

## V.

## The Judgment below.

The judgment adjudged that all the proceedings since the New York foreclosure judgment and the Vermont foreclosure decrees of 1872 should be set aside, and that the Union Trust Company as trustee

under both mortgages was entitled to have that judgment and those decrees now enforced.

That all the proceedings in Sackett's suit were tainted with fraud, and erroneous because the Union Trust Company was not a party.

And it adjudged that the judgment and the decrees of 1872 be enforced, and the property be sold under them (fols. 172–3).

It substantially set aside everything which had been done since the making of that judgment and those decrees, reviewed and reversed the proceedings and judgment in Sackett's suit, and set aside the sale and the Referee's deed under that judgment.

It enjoined all similar suits by other bondholders, and all other remedies, suits and proceedings of every kind, *including* the prosecution *by the parties to this action* of the sale under the decree of the Circuit Court of the United States.

> The language of that part of the judgment is, "That the defendants, "the Central National Bank of Boston, Peter Butler as receiver of the "Pacific National Bank of Boston, the Massachusetts Mutual Life Insur- "ance Company, Mary Strait, William C. Van Alstyne, Esther K. "Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis "A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland "N. Hazard, the New York, Rutland and Montreal Railway Company "and the American Loan and Trust Company, and all other owners of "certificates issued by the said Van Valkenburgh as receiver as afore- "said, and each of them, and their, and each of their officers, agents, "servants and attorneys are hereby perpetually enjoined and restrained "from proceeding with the sale under the decree in the action brought "by the defendant, the Central National Bank of Boston, against the de- "fendants Hazard, Foster, the New York, Rutland and Montreal Rail- "way Company, and the American Loan and Trust Company, a copy of "which is attached to the answer of the Central National Bank in this "action, and from suffering the said sale to proceed in their or any of "their names or behalf" (fols. 170-2).

It directed that *so much of the proceeds of the sale as would go to all such bonds as were owned by persons who were represented in Sackett's suit should go to the certificate holders*, and it directed a reference to ascertain which bonds were so represented.

## VI.

## Events which have happened since the judgment.

In defiance of the injunction contained in the judgment the defendant, *Peter Butler*, applied to the Circuit Court of the United States in the action in that Court for a direction to the Master *pro hac vice* to sell, notwithstanding the injunction. Upon that application the Court wrote the opinion reported in 49 Fed. Rep., a copy of which is in the accompanying papers (fol. 268). As the result of that opinion the Master *pro hac vice*, on the twenty-third of March, 1892, sold the things which, by decree in that action, it had been decreed that he should sell, and they were bought by William Foster, Jr.; the purchase money was paid; the deed delivered (fol. 323), and the sale confirmed (fol. 340) and the Master *pro hac vice* delivered his deed accordingly on the twenty-seventh day of April, 1892.

William Foster, Jr., then conveyed the same things to the Lebanon Springs Railroad, a New York corporation (fol. 298).

On the twenty-fourth day of April, 1894, the Lebanon Springs Railroad, by resolution of its Board of Directors, stipulated that the judgment in this action be affirmed, and directed the president of the company to make a formal stipulation, and to have a motion made to that effect.

Upon proof of these facts to the Court of Appeals, the Lebanon Springs Railroad and the plaintiffs below, moved in that Court for the affirmance of the judgment (fol. 292) and it was there affirmed.

## VII.

## The contempt proceedings.

After the order made by Mr. Circuit Judge Wallace directing the Master *pro hac vice* to proceed with the sale, the plaintiffs below began two proceedings in the Supreme Court of New York.

*One*, to punish Mr. Peter Butler for a violation of the injunction, *the other*, to punish all the other plaintiffs in error for a violation of the injunction.

These proceedings were both heard by the Court upon the day before that upon which the sale actually took place and were not immediately determined.

They have since been finally determined, the one secondly mentioned upon a finding of fact by that Court that none of the plaintiffs in error other than Mr. Peter Butler had in any way violated or disobeyed the injunction (fols. 418, 424).

The proceeding against Mr. Peter Butler was finally dismissed upon a suggestion to the Court of Mr. Peter Butler's death.

The final orders in these proceedings are given in the accompanying papers. Although not contained in the record of this action, they, as records of the Court can be read here in support of the judgment.

Bank of Charleston *vs.* Emerie, 2 Sand , 719.

Catlin *vs.* Grissler, 57 N. Y., 363, 373.

## BRIEF OF THE ARGUMENT.

### I.

### The plaintiffs in error are not in the position to question the validity of the injunction.

The sale, against which the injunction was directed, actually took place notwithstanding it, and they are therefore in precisely the same position as if the injunction had never been put in the judgment. The one thing which it forbid is done, and done irrevocably. The force of injunction is therefore gone forever.

Nor can they question it because they stand in peril of punishment for having violated it. Because it has been judicially and finally determined that they are not in any such peril.

What is more, the sale passed all their interest in the property. If they had a lien upon the railroad, as they claim, that lien, whatever it was, is now owned by the Lebanon Springs Railroad, defendant in error, one of the moving parties.

There is something in the affidavit of Mr. Bulkley in opposition to the motion in the Court of Appeals in regard to the sale being void because in violation of the injunction (fol. 352), but even if this were so it would still have passed their lien whatever it was.

"It is enough that an irregular or void judicial "sale, made at the instance of a mortgagee, passes "to the purchaser all the rights the mortgagee, "as such, had."

Brobst *vs.* Brock, 10 Wall., 519, 534.

But the sale was not void. It was good. If a human being who has title to land gives liberty of

seizure of it, the title passes, notwithstanding he may disobey an injunction in doing so (Butler *vs.* Niles, 35 How. Pr., 329, 331), and notwithstanding that the Court of Chancery which issued the injunction may have him, next instant, crushed to death by way of punishment for the violation of it. Of course, if the injunction was issued in an action, the pendency of that action binds the purchaser.

Union Trust Co. *vs.* South. Navigation Co., 130 U. S., 570,

and if it be ultimately determined in that action that he did not own the land, of course the purchaser gets nothing, but not because the grant was in violation of the injunction, but because the grantor had nothing to convey. If he had something, his deed would convey it, whatever he had.

But the sale in question was not even in violation of the injunction The injunction did not forbid the sale. It forbid *the parties* from proceeding with the sale and from suffering it to proceed. They did neither. It was the Court which made the sale, and there is not one word in the injunction which can be tortured into the slightest hint against it. Furthermore this has been judicially determined. So far as the plaintiffs in error are concerned, the Supreme Court of New York has finally adjudged that they did nothing in violation of the injunction. Therefore they did not "proceed," nor did they "suffer" the sale. As for Mr. Peter Butler, he is dead (fol. 427), and of course he is not here.

Lastly—were the law otherwise—it would hardly lie in the mouths of the plaintiffs in error to allege their own violation of the injunction in order to avoid their own sale upon which they received the purchase money, which they still retain. The injunction was got solely at the suit of the defendants in error, and they can condone a violation of it, or

stipulate or admit it away, if they please. The sale at the very utmost could only be voidable at their election—

> That the only interest of the plaintiffs in error is as certificate holders appears not only by the report of the Master, Mr. Lansing, who found who were certificate holders under the decree of the Circuit Court of the United States (fol. 129), but by their notice of appeal to the Court of Appeals. They are there described, for the most part, not by name, but as "certificate holders" (fol. 266). If they are not certificate holders therefor, they were not parties to the action in the Court below, and the writ of error must be dismissed for that reason.

It follows that even if a Federal question was originally presented by the allowance of the injunction, the plaintiffs in error cannot raise it—because they have sold and conveyed away their right to raise it—and their assignee is here insisting that they shall not raise it.

## II.

## The question presented by the injunction is not a Federal one.

The only possible argument to the contrary is that because the Circuit Court of the United States is created by, and owes its continued existence to, an act of Congress, therefore, to question one of its decrees is to construe a law of the United States.

Whether or not this would be so in an ordinary case, it is submitted that in this case it is not so. Nobody is here questioning the decree of the Circuit Court of the United States in the smallest particular. It was unquestionably correct.

It professes on its face to deal only with the title of the defendants to that action (fols. 119–110)—a title the source of which was the Supreme Court of New York. *That Court has swept away that*

*source*, as it had a right to do, and the whole foundation of what was being contended about in the action in the Circuit Court of the United States falls from under that action.

## III.

**The injunction was correctly adjudged; equity required that the parties to this action should not be permitted to proceed with the sale under the decree of the Circuit Court of the United States.**

That sale was a sale of the title sold in the Sackett suit.

The sale in the Sackett suit has been set aside by the judgment in this suit; the title under it extinguished, and a resale ordered.

It followed necessarily that the then pending sale should be enjoined as a matter of course.

I.—At least six ordinary and familiar rules required this.

FIRST.—When equity undertakes to adjust the interests in regard to the particular matter, it is her duty to do it *completely*, to give *complete* relief.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 34 N. Y., 30, 45.

The ultimate relief granted in that case was in accordance with the prayer of the complaint italicized at page 32 of 34 N. Y. The Special Term had permitted actions

for damages to progress so that they might be tried by juries (38 Barb., 534, 567). This was reversed and the damages assessed in the equitable action (34 N. Y., 33).

Barry *vs.* Brune, 8 Hun, 395, 405.

But *complete* relief would not have been given if the sale in the Central Bank's suit was permitted to proceed.

For it is obvious that two antagonistic sales of the same property should not be permitted at the same time. Mr. Hale has always claimed that he had the first lien and that his sale would give a complete title. We have always claimed that we had the first lien and that our sale would give a complete title. The two sales were going almost simultaneously—hostile titles to the same property, sold at about the same time. Each would, of course, lessen the price to be brought by the other. Neither would bring full value. It follows that but one should have been permitted. All parties were present in this suit and there was and could be no question but that the sale under the judgment in it would give a good title. But very few of the parties were present in the Central Bank suit, and the Court had just held that the sale in the Central Bank suit would give no title at all. The latter sale was, therefore, the one to be stopped.

It is quite apparent that the fact of a sale taking place in the suit by the Central Bank would reduce the value of the property and

lessen the amount to be realized upon the sale in this action.

That is quite sufficient reason for stopping it.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 17 N. Y., 592, 601.

SECONDLY.—The conveyance to the purchaser, under the sale in the Central Bank's suit would create a cloud upon the title. This is sufficient reason for stopping it, and it makes no difference that the purchaser under the sale in this action would have a defense.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 17 N. Y., 592, 601, 600, 598.

THIRDLY.—It was against equity and good conscience that the sale in the Central Bank's suit should proceed.

N. Y. & N. H. R.R. Co. *vs.* Haws, 56 N. Y., 175, 181.

FOURTHLY.—The ordinary rule as to the prevention of multiplicity of actions required it.

Their sale and interests acquired under it would naturally give rise to plenty of litigation, and that directly.

FIFTHLY.—This was the case of a judicial *sale*, *i. e.*, the sale in the Sackett suit, being set aside and a re-sale ordered, in which case all persons who hold under the sale set aside must be made parties and the title taken from them, in order that

the Court may sell it again. It is matter of course.

Hale *vs.* Clauson, 60 N. Y., 339, 341.

The foreclosure of a mortgage given to secure a judgment will be enjoined, when the judgment is set aside and an accounting ordered.

King *vs.* Duryea, 76 N. Y., 626.

In that case the stay was by motion in the action, but it need not be, and in this case could not be.

N. Y. & N. H. R.R. Co. *vs.* Haws, 56 N. Y., 175, 180.

SIXTHLY.—The *judgment* in the Sackett suit having been set aside, all proceedings under it should be stopped, and the judgment or order which set it aside should provide for that.

Chamberlin *vs.* Choles, 35 N. Y., 477.

II.—Mr. Hale's argument below was that the part of the judgment in question in some way overruled or reversed the decree of the Circuit Court of the United States. This is quite ungrounded in fact. No question which was involved in that suit, is in this. That was a private controversy between a few of the parties to this suit as to which of them owned the property which had come down to them under the sale in the Sackett suit. *This suit swept away the common source of their title.* It has nothing at all to do with their private squabbles.

Mr. Hale reached the point of the matter

when he said in his first brief below that "This case should not be confounded with "those in which something has risen since "the rendition of the judgment to render its "enforcement inequitable."

The reverse is the fact. Something *has* arisen.

The judgment swept away the title which was being quarrelled over in that case and otherwise gave to all the parties in that action complete relief. It followed that the relief which had been given by that action should be enjoined because its enforcement would now be inequitable.

Nobody is questioning the soundness of the decree in the United States Court. It was unquestionably right. The judgment in this action necessarily assumes that it was right, and follows its provisions so far as the distribution of the proceeds among the parties to that suit is concerned.

If that decree were a judgment of the Supreme Court of New York there would be not a doubt of the parties to this suit being enjoined from going on with it.

III.—It being necessary to enjoin the parties in this suit from proceeding with that sale, no embarrassment is occasioned, nor does it make any difference that that sale is under the decree of another Court.

N. Y. & N. H. R.R. Co. *vs.* Schuyler, 17 How. Pr., 464, 468.

N. Y. & N. H. R.R. Co. *vs.* Haws, 56 N. Y., 175.

Nor does it make any difference that that

other Court is the Court of another sovereign.

Vail *vs.* Knapp, 49 Barb. 299; Claflin *vs.* Hamlin, 62 How. Pr. 284.

Cairon Iron Company *vs.* McClaren, 5 H. L. C., 416.

Per Ld. Cranworth, p. 439.

Per Ld., St. Leonards, pp. 452–455.

Cole *vs.* Cunningham, 133 U. S., 107.

Nor that that other sovereign is the United States of America.

Embry *vs.* Palmer, 107 U. S., 3.

*a.* The reason of the thing.

Any other rule would prevent a Court of Equity from giving *complete* relief in dealing with a *res*. It would be very easy for two or three of the parties to such an action, who wished to defeat the jurisdiction, to get among themselves a judgment of the United States Court interfering with a part of the proposed relief.

The rule of comity prevents a State Court from interfering with a United States Court upon the same issue, and it is to be supposed that no Court would so interfere. But where this Court sweeps away a title given by one of its own judgments, and gives to the parties and privies under that judgment complete relief on the basis of an adjustment of all interests, it should stop all proceedings based upon the title thus swept away, even if in the United States Court.

*b.* And such is the law of New York, well settled by many adjudged cases.

Barry *vs.* Brune, 71 N. Y. 262;

Dinsmore *vs.* Neresheimer, 32 Hun, 204;

People *vs.* Erie Ry. Co., 36 How. Pr., 129.

*Barry* vs. *Brune* was this:

Mrs. Barry had a life insurance policy. Her husband got her to let it lapse, and took out a new policy to himself. Brune was the assignee of the husband. Brune brought an action upon the policy against the insurance company in the Circuit Court of the United States for the district of Maryland, and got a judgment. Mrs. Barry was not a party to that action. To the action of *Barry* vs. *Brune* in the Supreme Court of New York all were parties.

The Court at General Term said (8 Hun, 395): "Complete redress could be awarded "in no other way. As the judgment in the "other case was not actually satisfied of "record, its future collection, on the pay- "ment of the money to the person entitled "to receive it, or its deposit in Court for "her, was lawfully enjoined. (Savage "*vs.* Allen, 54 N. Y., 458; N. Y. and "Harlem R.R. *vs.* Haws, 56 N. Y., "175). The case was a special one, "and the controversy was properly termin- "ated in that manner. There would have "been no reason in allowing it to remain "open for future litigation upon the same "evidence in the Courts of another State. "But as this action was the first and only "one commenced for the purpose of settling "the conflicting claims made to the insur- "ance money, by a party who was a citizen "of this State, and all parties having any

"interest in the controversy were brought "before the Court, it could do no less "than it did, under the well settled prin- "ciples of equity jurisdiction, which re- "quired that the dispute should be com- "pletely and effectually disposed of by the "judgment finally rendered in the case. "(Rathbone *vs.* Warren, 10 Johns., 587; "Miller *vs.* McCann, 7 Paige, 451; Elliott "*vs.* Pell, 1 *id.*, 263, 268; Jones *vs.* Grant, "10 *id.*, 348, 350). Any different disposi- "tion would have invited further litigation "between some of the parties without being "attended by any beneficial result not "attainable in the present action." (pp. "404–405).

In the Court of Appeals Mr. Nash made a most elaborate brief, but this Court affirmed the judgment.

561 Ct. Appeals Cases (State Library).

*c.* All parties and privies, no matter how remote in the chain of title, by taking title under the Sackett suit, submit themselves to the jurisdiction of the Court below.

Hale *vs.* Clauson, 60 N. Y., 339, 341.

This, of course, includes all of the plaintiffs in error.

*d.* In contemplation of law, the Central Bank's suit was not in the United States Court. It was originally brought in the Supreme Court of New York, and although removed into the United States Court, was still to be determined and governed by the

laws and rules which govern the Supreme Court of New York, and by which that Court determines the controversies brought to its attention.

All that the decree of the United States Court is entitled to is the *same* force, effect and credit which would be given to a similar judgment of the Supreme Court.

"It is apparent, therefore, that no "higher sanctity or effect can be claimed "for the judgment of the Circuit Court "of the United States rendered in such a "case (where jurisdiction is derived from "citizenship), under such circumstances, "than is due to the judgments of the "State Courts in a like case and under "similar circumstances."

Dupasseur *vs.* Rochereau, 21 Wall., 130, 135.

"That the judgments and decrees of the "Circuit Court of the United States, sit-"ting in a particular state, in the courts "of that state, are to be accorded such "effect *and such effect only*, as would be "accorded in similar circumstances to the "judgments and decrees of a state tribu-"nal of equal authority."

Crescent Live Stock Co. *vs.* Butchers' Union, 120 U. S., 141, 147.

And that was given to it by the judgment in this action.

*e.* The cases cited below by Mr. Hale have no application. They hold that a State Court cannot enjoin a Court of the United

States. Nobody pretends that it can. And nobody has attempted to do any such thing.

No conflict of jurisdiction or process is possible. There is nothing in this judgment which interferes with the decree, or the process, or the officers of the United States Court. They can go on if they like. They have gone on. Nothing has been served upon them, and it would not be of the least effect, if it were, for there is not a word in the judgment which can be construed as applying to them. The judgment binds the parties to this action and nothing more. And the difference between the two things is not technical, nor verbal merely, it is *substantial.*

Dehon *vs.* Foster, 4 Allen, 545, 550.

Dehon *vs.* Foster, 7 Allen, 57.

Van Gilder *vs.* Van Gilder, 26 Hun, 356, 360.

*And the Courts of the United States hold the same thing.*

Embry *vs.* Palmer, 107 U. S., 3.

In reviewing a decree of the Supreme Court of Errors of Connecticut, which enjoined the parties from proceeding on a judgment of the Supreme Court of the District of Columbia—

The Court said, p. 10:

"That the Supreme Court of the Dis-
"trict of Columbia is a Court of the
"United States results from the right of
"exclusive legislation over the District
"which the Constitution has given to

"Congress. Accordingly, the judgments "of the Courts of the United States have "invariably been recognized as upon the "same footing, so far as concerns the "obligation created by them, with domes- "tic judgments of the States wherever "rendered, and whenever sought to be "enforced. *Barney* vs. *Patterson*, 6 "Har. & J. (Md.), 182; *Niblett* vs. *Scott*, "4 La. Ann., 246; *Adams* vs. *Way*, 33 "Conn., 419; *Womack* vs. *Dearman*, 7 "Port. (Ala.), 513; *Pepoon* vs. *Jenkins*, "2 Johns. (N. Y.) Cas., 119; *Williams* vs. "*Wilkes*, 14 Penn. St., 228; *Turnbull* vs "*Payson*, 95 U. S., 418; *Cage's Ex'rs* "vs. *Cassidy*, 23 How., 109; *Galpin* vs. "*Page*, 3 Sawyer, 93, 109.

"The rule for determining what effect "shall be given to such judgments is that "declared by this Court, in respect to the "faith and credit to be given to the judg- "ments of State Courts in the Courts of "other States, in the case of *M'Elmoyle* "vs. *Cohen*, 13 Pet., 312, 326, where it is "said: 'They are record evidence of a "'debt, or judgments of record, to be "'contested only in such way as judg- "'ments of record may be; and, con- "'sequently, are conclusive upon the de- "'fendant in every State, except for such "'causes as would be sufficient to set "'aside the judgment in the Courts of "'the State in which it was rendered.'"

There has for *ninety-eight years* been upon the Statute books of the United States

an Act of Congress, which as now codified in the Revised Statutes reads as follows:

"The writ of injunction shall not be "granted by any Court of the United "States to stay proceedings in any Court "of a State, except in cases where such "injunction may be authorized by any "law relating to proceedings in bank-"ruptcy."

(R. S., U. S., § 720.)

This is *at the least* as strong as the holdings of the United States Courts referred to.

*Nevertheless, the United States Courts hold that they can enjoin parties to actions before them from proceeding in State Courts*, and they do so enjoin them.

Here are some cases taken at haphazard: When it is *inequitable:*

Linton *vs.* Mosgrove, 14 Fed. Rep., 543.

When the Court has possession of the fund in controversy:

The Tolchester, 42 Fed. Rep., 180, 185.

*Generally:*

Dietsch *vs.* Hindekoper, 103 U. S., 494.

"If the bill is not maintainable, the ap-"pellees would find themselves in pre-"cisely the same plight as if the judg-"ment of the United States Circuit Court "in the replevin suit had been against "them instead of for them. The judg-

"ment in their favor would settle noth-
"ing. Instead of terminating the strife
"between them and their adversaries, *it*
"*would leave them under the necessity of*
"*engaging in a new conflict elsewhere.*
"*This would be contrary to the plainest*
"*principles of reason and justice,*"
p. 498.

French, trustee, *vs.* Hay, 22 Wall., 250.
B. & O. R. Co. *vs.* Ford, 35 Fed. Rep., 170.
Providence & N. Y. S. Co., 6 Ben., 124.
Long Island, &c., Transportation Co., 5 Fed. Rep., 599, 626.
The Amsterdam, 23 Fed. Rep., 112.
Murray *vs.* Overstotte, 8 Fed. Rep., 110.
Fisk *vs.* Union Pacific R.R. Co , 10 Blatch., 518, 520.

Marshall *vs.* Holmes, 141 U. S., 589.

"These authorities would seem to place
"beyond question the jurisdiction of the
"Circuit Court to take cognizance of the
"present suit, which is none the less an
"original, independent suit, because it
"relates to judgments obtained in the
"court of another jurisdiction. While it
"cannot require the State Court itself to
"set aside or vacate the judgments in
"question, it may as between the parties
"before it, if the facts justify such re-
"lief, adjudge that Mayer shall not enjoy
"the inequitable advantage obtained by
"his judgments. A decree to that effect
"would operate directly upon him, and
"*would not contravene that provision*
"*of the statute prohibiting a court of the*
"*United States from granting a writ of*

"*injunction to stay proceedings in a* "*State Court.* It would simply take from "him the benefit of judgments obtained "by fraud." *pp. 596–600.*

As the Act of Congress creating the Circuit Courts of the United States expressly says that their jurisdiction shall be "concurrent" with that of the Courts of the several States (~~R. S., §~~ ; 20 Stat. at Large, p. 434), these authorities are precisely in point.

*f.* The property in question was in the possession of the Court below (fol. 179). It was not in possession of the United States Court.

It was in the possession of the Court below, too, under an elder and a better title than that which was being adjudicated about in the United States Court. It could therefore never be got into the possession of the United States Court, and it was a necessity that the Court below should deal with it *completely.*

This somewhat extended statement of well-settled and elementary principles has been thought necessary, because Mr. Circuit Judge Wallace ordered his officer to proceed with the sale under the decree in the U. S. Court, after the judgment below had been rendered.

His opinion, which is reported in 49 Fed. Rep., is in the motion papers (fol. 268).

## IV.

## Certain other errors are assigned.

1. The injunction at folio 168 restraining all holders of certificates from bringing and proceeding with any action or proceeding to enforce any lien upon or in any way to affect the railroad.

   There are three answers to this:

   FIRST.—It does not present any Federal question.

   SECONDLY.—As the plaintiffs in error have sold all their interest in the premises, it is not any concern of theirs and they cannot raise the question.

   THIRDLY.—The provision is appropriate to the relief to be given and is usual and proper. The Court being about to sell the railroad, should give a clean title. And if there is in the books anywhere any case, the entanglements of which require the exercise of the extraordinary protective remedies of a Court of equity, it is submitted that it is this one.

2. The provision in the judgment at folio 182 directing the referee to ascertain who were the holders of the receiver's certificates and, with a view to that end, to take proofs.

   This provision was put in the judgment because the Court had adjudged that the portion of the purchase money which would go to the bonds whose owners had been concerned in the Sackett suit should be paid to the holders of the certificates. For this pur-

pose it was necessary to find out who they were.

The objection is that who they were had been conclusively determined in the Central Bank suit in the Circuit Court of the United States.

To this also there are several answers.

FIRST.—It is true that, three years before, the persons who then owned the certificates had been ascertained (fol. 126), but it does not follow that the ownership had continued the same. Possibly some of them had sold.

SECONDLY.—In no conceivable aspect can it present a Federal question.

THIRDLY.—As the ascertainment was solely for the purpose of the distribution of the proceeds to come from the sale of the railroad, and as the plaintiffs in error have sold out their interest in that railroad, they cannot raise the question.

FOURTHLY.—Without such a provision in it, the judgment would have been bad under the Constitution of New York.

3. The provision in the judgment at folio 131 directing the referee to ascertain who were the holders of the Lebanon Springs and Harlem Extension bonds and which of them were represented in Sackett's suit.

The answers given to the immediately preceding assignment will apply to this, with the further answer that, as the plaintiffs in error have never had any of such

bonds it is not easy to see how the question concerns them.

4. That the Court below erred in refusing to hold that the certificates were a first lien upon the railroad and that from any sale of the railroad the certificates should be first paid.

To this there are several answers.

FIRST.—As the plaintiffs in error have sold out whatever interest in the property the certificates had given them they cannot raise the question.

SECONDLY.—The question is not a Federal one.

THIRDLY.—From the facts found, which are not questioned by these assignments, the contrary conclusion and judgment inevitably follow.

The judgment of the Court of Appeals of New York should be affirmed.

EDWARD WINSLOW PAIGE,
Of Counsel.

IN THE 1

# Supreme Court of the United States,

No. 568 OF OCTOBER TERM, 1895.

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

*against*

AARON R. STEVENS and others,
Defendants in Error.

On Motion to Dismiss or Affirm.

2

SIRS:

You will take notice that upon the annexed printed portions of the record, and the other papers annexed, I will move the Supreme Court of the United States upon the sixth day of January, one thousand eight hundred and ninety-six, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, to dismiss the writ of error in this action upon the ground that the case does not contain any Federal question, and that I will also at the same time and place and upon the same papers, move the Court that the judgment of the Court of Appeals be affirmed, because it is manifest that the writ of error was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further arguments. 3

That I will make such motions on the part of the following defendants in error: The Lebanon Springs Railroad, Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglas as trustee, and Ida S. Harrison.

New York, 11th of November, 1895.

Yours very truly,
EDWARD WINSLOW PAIGE,
Attorney for the said Defendants in Error.

To the Honorable
HENRY D. HYDE and
MATTHEW HALE,
Attorneys for the Plaintiffs in Error.

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(*From the Record, at the end of it.*)

UNITED STATES OF AMERICA, ss.:

The President of the United States of America, to the Honorable the Judges of the Court of Appeals of the State of New York.

GREETING:—Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said Court of Appeals of the State of New York, before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Aaron R. Stevens, Harper W. Rogers, Nancy E. Wilbur, Andrew A. Douglass as Trustee under the last will and testament of William Henry Douglass, deceased, and Ida S. Harrison plaintiffs and the Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler as receiver of the property of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert

impleaded with the Union Trust Company of New 7
York, James C. Hull, William Butler Duncan, John G. McCullough as administrator of the goods, chattels and credits of Trenor W. Park, deceased, The New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfiled as receiver of the property of the New York, Boston and Montreal Railway Company, Marvin Sackett, Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and the 8
American Loan and Trust Company, and William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Dewing, John A. Nichols, Henry A. Tweed, as surviving Trustees of the creditors and stockholders of the New York Loan and Indemnity Company, Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndike, William F. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting and Eustace C. Fitz, and William D. Shipman, as Assignee of William Butler Duncan defendants, wherein was drawn in question the 9
validity of a treaty or statute of, or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question, the validity of a statute of, or the authority exercised under said state, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under the United States, and the decision was against the title, right, privilege or

10 commission specially set up or claimed under such clause of the said constitution, treaty, statute or commission; manifest error hath happened to the great damage of the said The Central Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert as by their Complaint appears. We being willing that error, if any hath happened, should be duly corrected,
11 and full and speedy justice be done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, that all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein, to correct the error, what of right, and according to the laws and
12 custom of the United States, should be done.

Witness, the Honorable MELVILLE W. FULLER, Chief Justice of the United States, the 7th day of March, in the year of our Lord one thousand eight hundred and ninety-five.

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States in and for the Northern District of New York.

Allowed by

CHAS. ANDREWS, Ch. Judge Ct. of Appeals of State of New York.

(*From the Record, fol. 2624 of Printed Book.*) 13

SUPREME COURT.

TRIAL DESIRED IN RENSSELAER COUNTY.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

*against*

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York,

Defendants. 14

*To the above-named Defendants:*

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty 15 days after the service of this summons, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated April 9, 1886.

HALE & BULKELEY,
Plaintiff's Attorneys,
Office and Post-office address,
25 North Pearl Street,
Albany, N. Y.

16 (*From the Record, fol. 2629 of Printed Book.*)

SUPREME COURT,

COUNTY OF RENSSELAER.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

*against*

17 ROWLAND N. HAZARD, William Foster, Jr., the New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York.

The complaint of the above-named plaintiff respectfully shows:

I.—That the plaintiff is a banking association duly organized and incorporated under the Laws
18 of the United States, located and doing business in the City of Boston, in the Commonwealth of Massachusetts.

II.—Plaintiff alleges, upon information and belief, that on or about the 2d day of April, 1881, in an action in this court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, upon the petition of one John W. Van Valkenburgh, who had theretofore been appointed in said action as receiver of the Lebanon Springs Railroad Company, an order was duly made at a Special Term of this court, bearing date the said 2d day of April, 1881, and duly en-

tered in the office of the clerk of the county of Rensselaer, whereby the said John W. Van Valkenburgh, as receiver as aforesaid, was authorized and directed to issue, under his hand, receiver's certificate of indebtedness dated April 2, 1881, with interest at six per cent. of five hundred dollars each payable in five years, with interest coupons thereto attached payable on the first day of January and July in each year, in the aggregate amount of three hundred and fifty thousand dollars. Said certificates to be signed by said Van Valkenburgh as such receiver, consecutively numbered fr[illegible] one to seven hundred, inclusive, and a certificate on each thereof duly signed by one of the officers of the Farmers' Loan and Trust Company of New York City; that said certificates are of the series included in the numbers and amount aforesaid; that said certificates and the interest coupons thereto attached be made payable at said Farmers' Loan and Trust Company in said City of New York. And whereby it was further ordered that said receiver negotiate said certificates to the amount aforesaid, and with the moneys arising thereupon, pay and discharge certain previous certificates theretofore authorized by order of this court, and from the moneys arising from said certificates the said receiver was also empowered and directed by said order to purchase all necessary materials for the repairs of said railroad, and to pay and discharge all necessary expenses incident to the repairs thereof, and all other expenses attending the running and successful managing and operating of said railroad, together with such indebtedness as might be found to be due to claimants by the referee in said order named; and by said order it was further provided, directed and decreed, that said receiver's certificate of indebtedness, to the amount therein directed to be issued, be and the

22 same were thereby declared to be a debt of the Receiver incurred for the benefit and protection of the said Lebanon Springs Railroad, and its owners and bondholders thereof, and said certificates to the said amount of three hundred and fifty thousand dollars were, by said order, declared and decreed to be a first lien on said railroad bed, track, ties, trestles, bridges, culverts, engines, cars, depots, and all and every kind of property, either owned by said railroad company or in the possession of the receiver thereof, and that said certificates were to be recognized as such in any reorganization of the company, or in its consolidation with any
23 other company, and that in case of any sale of the said railroad, the property in the hands of the receiver and franchises under any decree of the Supreme Court, said certificates were to be first paid from the first moneys realized thereupon by the receiver, unless sooner paid and canceled by him from the earnings of said railroad. But it was further provided in said order that in case the said railroad property in the hands of the receiver, and franchises on any sale thereof, should not bring sufficient to pay the full amount of principal and interest then due on the outstanding negotiated
24 certificates in said order authorized to be issued, then the purchaser of said railroad and the property in the hands of the receiver and franchises should assume, as a first lien thereon, so much of said principal as at that time should remain outstanding and unpaid, with interest thereon, as by reference to said original order, or the record thereof, as entered in the County of Rensselaer, will more fully appear.

III.—And plaintiff further alleges, upon information and belief, that the said John W. Van Valkenburgh as receiver as aforesaid, under and in pur-

suance of said order, did duly issue and negotiate 25
certificates of indebtedness in the manner and form by said order provided, to the said amount of three hundred and fifty thousand dollars. And that he duly applied the moneys received from the said certificates to the uses and purposes in the said order mentioned and authorized.

IV.—And the plaintiff further alleges that it is now, and has for several years last past been, the holder and owner of said certificates, amounting in the aggregate to two hundred and fifty thousand dollars of principal thereof.

26

V.—And the plaintiff further alleges, upon information and belief, that the certificates of indebtedness issued and negotiated by said receiver, which are not held by this plaintiff, are held by divers persons and corporations, many of whose names are unknown to this plaintiff.

VI.—And the plaintiff further says, upon information and belief, that in the said above-entitled action, wherein Marvin Sackett was plaintiff and Russell C. Root and others were defendants, upon the trial of the issues therein this plaintiff appeared 27
by its attorneys and counsel and made proof in regard to the issuing of said receiver's certificates and its title thereto, and that such proceedings were had in said action; that on or about the 12th day of January, 1885, a judgment was duly rendered therein by which it was, among other things, adjudged and decreed that the said certificates of indebtedness, issued by the said John W. Van Valkenburgh as receiver as aforesaid, under and by virtue of the above-mentioned order, amounting in the aggregate to three hundred and fifty thousand dollars, were ratified and

confirmed and declared to be a first lien on the said railroad and its property, as provided in and by the said above-mentioned order, and as stated in said certificates, for the amount of principal and interest unpaid thereon, subject to the payment of certain costs and expenses in the said judgment provided for; and whereby it was further adjudged and decreed that the property, franchises and rights of the Lebanon Springs Railroad Company, as described in and enumerated in a certain mortgage made by said company to the Union Trust Company of New York, and as in the said judgment particularly described and set forth, and all the right, title and interest of any and of all the parties to said action therein and thereto, including all property and assets in the hands of the receiver in said action appertaining thereto, wherever the same might be, be sold at public auction in the county of Rensselaer by George McClellan, Esq., of Chatham, Columbia County, New York, Referee appointed in and by said judgment to make such sale for the benefit of the first mortgage bondholders of the said railroad company issued July 1, 1867, for the amount of two millions of dollars, and that said sale be made subject to the payment of the undue principal and interest of the said receiver's certificates, and that the purchaser or purchasers of said railroad property and franchises should take the said railroad property and franchises subject to the unpaid principal and interest on the said receiver's certificates, and that said purchaser or purchasers should assume, as part of the consideration of the said purchase, the payment thereof as above stated, and that from the avails of said sale, after the payment of certain other expenses therein provided for, the said referee pay the amount of interest due on said receiver's certificates, as by reference to the said judgment, which was duly entered in the office of

the clerk of the County of Rensselaer, will more 31
fully appear.

VII.—That under and in pursuance of said judgment the said George McClellan, the referee therein named, did duly advertise for sale on the 12th day of June, 1885, and did sell at public auction the premises, rights, franchises and property in the said judgment mentioned and described, and the above-named defendants, William Foster, Jr., and Rowland N. Hazard, became the purchasers thereof for the price or sum of one hundred and fifty-five thousand dollars, that being the highest sum bid therefor; and the said defendant William 32
Foster, Jr., acting on behalf of himself and the said defendant Rowland N. Hazard, did then and there, by his duly authorized attorney, pay to said referee five per cent. of said purchase price, and did, by said attorney, subscribe a certain contract of sale, which was also subscribed by said referee, whereby, among other things, he did, for himself and said Hazard, assume and agree to pay the amount of unpaid principal and interest on said certificate of indebtedness, as part of the consideration of such purchase. And the balance of said sum of one hundred and fifty-five thousand dollars was thereafter, as plaintiff is 33
informed and believes, paid by the said purchasers to the said referee, and the said referee did thereafter duly execute and deliver to the said defendants, William Foster, Jr., and Rowland N. Hazard, a deed of the said premises and property in said judgment described. And the said referee paid from said sum of one hundred and fifty-five thousand dollars the interest then due on said certificates, amounting to about sixty thousand dollars.

VIII.—That the said referee's deed above mentioned was, as this plaintiff is informed and believes,

34 accepted by said defendants, William Foster, Jr., and Rowland N. Hazard, and was by them delivered to the clerk of the County of Rensselaer for record, and was duly recorded in the office of the said clerk of Rensselaer County, in Book 212 of Deeds, page 406. That in and by the said deed the grantees therein, the said defendants, Hazard and Foster, took said premises and property subject to the said unpaid principal and interest on the said receiver's certificates, as required by the said judgment as aforesaid.

35 IX.—And plaintiff further says that the principal of said certificates, with interest from the 1st day of January, 1886, became due and payable upon the 2d day of April, 1886. That on that day the said certificates, amounting to two hundred and fifty thousand dollars, held by this plaintiff as aforesaid, were duly presented to the Farmers' Loan and Trust Company of the City of New York, where the same were payable, and payment thereof was demanded, but the same was refused, and the whole of the said principal, with interest from the 1st day of January, 1886, is now due and unpaid.

36 X.—That the said railroad premises mentioned in the said judgment and in the said referee's deed are described as follows: The following is a description of said premises and property as contained in the mortgage made by the Lebanon Spring Railroad Company to the Union Trust Company, the interest of the parties to this action and of the bondholders of the said Lebanon Springs Railroad Company, in which it is directed to be sold:

"All the right, title and interest of the said party of the first part (said railroad company) of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of

the first part, from the Chatham Four Corners, in 37
the county of Columbia, to the east line of the state
of New York, in the town of Hoosick, in the county
of Rensselaer and all lands thereafter to be
acquired for the purpose of forming said track or
railway; also, the railroad of the said party of the
first part, now built and to be built, and all the
rails, bridges, fences, stations, station-houses,
wood-houses, buildings and other structures and
appurtenances thereunto belonging, and also all the
tolls, incomes, rents, issues and profits and alienable
franchise of the said party of the first part, con-
nected with said lway or relating thereto, includ-
ing its rights and anchises as a corporation; and 38
also all the rol. .g stock, locomotives, tenders,
snow ploughs and scrapers and all the passenger
cars, baggage, mail and express cars, freight, stock,
and dumping cars, flat cars, and cars of every de-
scription; all the machine shops and blacksmith
shops and all the articles used in the construction,
replacing and repairing of roads and cars, and in the
running of the cars now owned or hereafter to be
acquired by the said party of the first part, all of
which chattels are declared to be fixtures and
appurtenances to said railroad and are to be and be
sold therewith and not separate therefrom and to be 39
taken as a part thereof; and also all the right, title
and interest which the said party of the first part
may have or may hereafter acquire of, in and to the
Vermont and New York Railroad, constructed or to
be constructed from the terminus of the railroad of
the party of the first part in the town of Hoosick
aforesaid, to the village of Bennington, in the
State of Vermont, including all the right, title and
interest of the party of the first part, of, in and to
the franchise and equipment of the said Vermont
and New York Railroad belonging or in any wise

40 appertaining, or which may at any time belong or appertain to the same, as well in law as inequity."

XI.—That, as plaintiff is informed and believes, the defendants, or one or some of them, are now in possession of the premises and property above described and are using and operating the same for railroad purposes, and that all the said defendants have, or claim to have, some interest in or a lien upon the said premises or some part thereof, which interest or lien, if any, has accrued subsequently to the lien of the said certificates.

41

XII.—That there is now justly due this plaintiff, upon the said certificates held by it, the said sum of two hundred and fifty thousand dollars, with interest thereon from the 1st day of January, 1886.

Wherefore, the plaintiff prays that the unpaid principal and interest of said receiver's certificates may be adjudged to be a lien upon the above described premises in the hands of the purchasers thereof, and of any persons claiming through or under the purchasers at said referee's sale, and that the defendants and all persons claiming under them, or either of them, subsequent to the com-
42 mencement of this action, may be barred and foreclosed of all right, claim or lien and equity of redemption in the said premises; that a receiver of the said premises, to receive the rents and profits thereof pending this suit for the benefit of the plaintiff and the other holders of said certificates, may be appointed by order of this court; that the said premises, or so much thereof as may be sufficient to raise the amount due to the plaintiff and to the other holders of said certificates for principal and interest and costs, and which may be sold separately without material injury to the parties interested, may be decreed to be sold according to law;

that out of the moneys arising from the sale thereof, 43
the plaintiff and other holders of said certificates, who may come in and prove their title thereto and the amount due thereon, may be paid the amount due on said certificates, with interest to the time of such payment, and the costs and expenses of this action so far as the amount of such moneys properly applicable thereto will pay the same, and that the defendants Rowland N. Hazard and William Foster, Jr., may be adjudged to pay any deficiency which may remain after applying all of said moneys so applicable thereto, and that the plaintiff, in behalf of itself and the other ceriificate holders as aforesaid, may have such further or 44
other relief in the premises as shall seem to the court just and equitable.

HALE & BULKELEY,
Plaintiff's Attorneys,
25 North Pearl Street,
Albany, N. Y.

STATE OF NEW YORK,
City and County of Albany, } ss.:

HENRY D. HYDE, being duly sworn, deposes and says that he is one of the directors of the plaintiff 45
in this action; that he had read the foregoing complaint and knows the contents thereof; that the same is true to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

HENRY D. HYDE.

Sworn to before me this 9th day of April, 1886.

WM. JOHNSON,
Notary Public,
Albany County, N. Y.

46 (*From the Record—Fol. 2676 of printed book.*)

N. Y. SUPREME COURT,

COUNTY OF RENSSELAER.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

47 *against*

ROWLAND N. HAZARD, William Foster, Jr., and The New York, Rutland and Montreal Railroad Company, and The American Loan and Trust Company of New York,

Defendants.

The defendants Rowland N. Hazard and William Foster, Jr., for their separate answer to the plain-
48 tiff's complaint herein:

I.—Deny any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs or subdivisions of the complaint marked respectively I, II, III, IV and V.

II.—And answering the paragraph or subdivision of the plaintiff's complaint marked VI, the defendants admit and aver that upon the trial of said action, wherein Marvin Sackett was plaintiff and Russell C. Root and others defendants, this plaintiff appeared by its attorneys and counsel and

made some proof in regard to the said receiver's 49
certificates, and that the judgment, which was duly rendered in said last-mentioned action, among other things provided that the property and franchise of the Lebanon Springs Railroad Company, as enumerated and described in the mortgage made by said company to the Union Trust Company, be sold at public auction in the County of Rensselaer, by George McClellan, Esq., referee, Columbia County, the referee appointed in and by said judgment to make such sale; but these defendants deny any knowledge or information thereof sufficient to form a belief as to the other allegations 50
contained in the said paragraph or subdivision of the complaint marked VI.

III.—And answering the paragraph or subdivision of the complaint marked VII, these defendants admit that in pursuance of said judgment the said George McClellan, as such referee, did duly advertise the said property and franchise of the Lebanon Springs Railroad Company for sale, on or about the 28th June, 1885, and did subsequently sell the same at public auction to these defendants, who became the purchasers thereof for the price of $155,000, and that these defendants did then and 51
there, by their duly authorized attorney, subscribe to a certain contract of sale, which was also signed by said referee; but these defendants expressly deny that the contents of said contract are correctly set forth in the plaintiff's complaint herein, and that they did, by said contract or otherwise, assume and agree to pay to the plaintiff the amount of unpaid principal and interest on the receiver's certificates held by this plaintiff.

IV.—And answering the paragraph or subdivision of the complaint marked VIII, the defendants admit the same.

52 V.—And answering the paragraph or subdivision of the complaint marked IX, the defendants deny any knowledge or information thereof sufficient to form a belief as to any of the allegations therein contained.

VI.—And answering the paragraph or subdivision of the complaint marked X, these defendants aver, upon information and belief, that the description therein contained of the premises conveyed by the referee's deed is correct.

VII.—And further answering, these defendants
53 deny each and every allegation of the complaint not hereinbefore expressly admitted or denied.

VIII.—And for a separate and distinct answer to the plaintiff's complaint herein, these defendants aver that they acquired the said property mentioned in the plaintiff's complaint, with notice that the receiver's certificates were outstanding and of the sum justly due therefor; and these defendants have ever since been and now are ready and willing to pay the sum justly due on account of the said receiver's certificates
54 to the persons lawfully entitled thereto, but these defendants are advised and believe that this plaintiff is not entitled to receive payment thereof. That when the said property came into the hands of these defendants, as aforesaid, it was subject to a lien for the amount actually due from the said receiver, Van Valkenburg, and his successor, in the trust for the amount of said receiver's certificates, but for no other or greater amount; and that these defendants, when they acquired the aforesaid estate and property, succeeded to all the rights of the prior owners of said property as well as to their obligations; and that in case it be held that the lien

against said property is enforceable in this action against the property after the discharge of the receiver, that then these defendants ought to be permitted to assert the rights and equities of those with whom these defendants are privy in estate. 55

That in accepting the deed of the premises aforesaid, these defendants intended only to obligate themselves to pay the amount actually due the receiver on account of said certificates, with proper interest, and no other or greater sum by way of profit, and these defendants aver that they incurred no greater or other obligation in the premises.

Wherefore, these defendants ask judgment that the complaint be either dismissed, with costs, or that an accounting be had in the premises to determine what, if any, liens are on the property aforesaid, and in whose favor, so that the defendants may be fully assured and protected for any payments for or on account of said receiver's certificates. 56

VANDERPOEL, GREEN & CUMING,
Attorneys for Defendants
Hazard and Foster,
No. 2 Wall Street,
New York City.

City and County of New York, ss.:

ROWLAND N. HAZARD and WILLIAM FOSTER, JR., being severally duly sworn, each for himself, says that he is one of the defendants herein; that he has read the foregoing answer and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true. 57

R. N. HAZARD,
WM. FOSTER, JR.

Sworn to before me this 7th day of June, 1886.

F. SPECHT, Notary Public,
Kings and New York Counties, N. Y.

58 (*From the Record, fol. 2696 of printed book.*)

SUPREME COURT.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

*against*

59 THE NEW YORK, RUTLAND AND MONTREAL RAILWAY COMPANY, impleaded with others,

Defendant.

The New York, Rutland and Montreal Railway Company, by Robert Ludlow Fowler, its attorney, makes answer to the complaint herein as follows:

I.—It denies any knowledge sufficient to form a belief concerning the allegations contained in paragraphs numbered I and II of the complaint, excepting that it admits that by a certain order of the
60 said Supreme Court, John W. Van Valkenburgh was duly authorized and empowered to issue and emit receiver's certificates in the aggregate amount of $350,000, but for greater certainty this defendant asks leave to refer on the trial hereof to the original of the order in question, and to the terms, limitations and conditions of such order and emission.

II.—This defendant denies the allegations contained in paragraphs III and IV of the complaint, excepting as hereinafter qualified and controverted.

III.—This defendant alleges that in respect of the

certificates referred to in paragraph V of the com- 61
plaint, the holders thereof do not and cannot unite with plaintiff in this action, nor are they represented by plaintiff bank, nor has plaintiff bank any power or authority to represent such holders in this action, but it sues for itself alone.

IV.—This defendant further answering, saith that in respect of the action referred to in paragraph VI of the complaint, it is informed and believes that plaintiff was not bound by any decree therein as it was not a party thereto, and no proofs were 62
ever taken therein in any way affecting or determining plaintiff's rights against the property or fund referred to in the complaint.

Defendant admits that by such decree certain certificates issued by John W. Van Valkenburg, receiver, were declared to be, as hereinafter alleged, a first lien on the railroad and property referred to in the complaint herein. But defendant denies any knowledge sufficient to form a belief whether the certificates now claimed to be held by this plaintiff are any portion of such certificates so declared to be a lien, as aforesaid, or whether such declaration constitutes a valid and subsisting lien in favor of this plaintiff bank, enforceable in this action 63
against this defendant or its property.

V.—This defendant further answering, admits the allegations of the complaint contained in paragraph VII of the complaint, excepting that defendant denies that defendants Hazard and Foster ever agreed to pay in excess of the $155,000 (actually paid by them) more than was justly due by the receiver aforesaid on his certificates, nor did said Hazard and Foster acquire the property described in the complaint, subject to a lien for a sum greater than that justly due and owing to the *bona fide*

64 first takers of the receiver's certificates aforesaid, and this defendant alleges that the amount justly due by such receiver on such certificates has never been ascertained by any judicial inquiry, binding on any person soever, and particularly this defendant. Nor has it ever been ascertained who were the *bona fide* first takers for value of such receiver's certificates.

VI.—And this defendant further answering, admits the allegations contained in paragraph VIII of the complaint, except that it denies that by the
65 terms of the conveyance the defendants Foster and Hazard, or either of them, took the property referred to in the complaint subject to a lien for a sum greater than that justly due by the receiver aforesaid to the original and *bona fide* holders of the certificates issued and emitted by him.

VII.—This defendant denies the allegations contained in paragraph XII of the complaint.

VIII.—And for a further and separate defense to the complaint, this defendant alleges upon information and belief that heretofore, to wit, on the 2d
66 day of April, 1881, in an action in the Supreme Court of the State of New York, in which Marvin Sackett, on behalf of himself and all others similarly situated, was plaintiff, and Russell C. Root and others were defendants, the said Supreme Court authorized one John W. Van Valkenburgh, as receiver of the Lebanon Springs Railroad Company, to issue and emit receiver's certificates amounting in the aggregate to the par value of $350,000, and bearing interest at and after the rate of six per cent. per annum, but said Van Valkenburgh was ordered by said Court to negotiate said certificates for par, and not otherwise as by a limitation contained on

the face of the said order, this defendant believes and charges, does appear. 67

That said Van Valkenburgh, receiver, in violation of the terms of the said order, issued 500 of said certificates, of the par value of $500 each, to one Edward Crane, as his agent, and without any consideration. And said Crane then pledged or hypothecated such 500 certificates with the Pacific National Bank of Boston, to secure a loan made by such Pacific National Bank to said Crane. That subsequently said Crane is said to have paid over to said receiver a portion of the sums thus realized by him, but said property described in the complaint became liable, by reason thereof, only for 68 the sums actually so received by its receiver in the aggregate, a sum greatly less than the face of said certificates.

And defendant further shows and alleges, that these said certificates so issued to Crane, as aforesaid, may be those now claimed to have passed to this plaintiff, at or about the time when said Pacific National Bank became grossly insolvent. And this defendant alleges that if they have so passed to the plaintiff bank, it is as collateral for some debt or claim due to such plaintiff by said insolvent Pacific National Bank, or by said Crane, or by some other 69 intermediary, and not for value then or ever paid by the plaintiff bank; and so it is the plaintiff can, in any event, have no rights in respect thereof superior to those of said Paciffc National Bank, or the said Crane, or the first holder thereof.

And defendant alleges, that such certificates, by the law in that behalf made and provided, were not negotiable nor assignable, excepting subject to all equities and to the extent of the amount actually due by the said receiver to said first holder, or to said Pacific National Bank, or to said Crane, and if any of such certificates passed to the plaintiff they

70 so passed subject to all the equities existing in favor of said receiver, whatever they may have been. And this defendant admits, that all said certificates issued by said receiver were a charge on all the property in the hands of said receiver, for the amount actually paid for such certificates or advanced thereon by the said first holder; with lawful interest at six per cent. on the sums so advanced from the date of the advance, but for no more than the sum so paid, with proper interest thereon.

That subsequent to such omission aforesaid, said Van Valkenburgh was discharged from his said
71 receivership and was succeeded by one William V. Reynolds, who acquired said property subject to the lien of the said receiver's certificates as aforesaid. That subsequently thereto such proceedings were had, that the said property described in the complaint in the said action of Sackett against Root and others was regularly brought to a judicial sale by virtue of a judgment and decree of said Supreme Court in said action made and entered, and it was then purchased in by the defendants Hazard and Foster.

That subsequent thereto the said Hazard and
72 Foster conveyed and transferred all the said property and franchises precisely as conveyed to them by George McClellan, Esquire (a referee thereunto duly empowered), to this answering defendant, subject, however, to the payment of the sum justly due by said receivers, but subject to no greater sum than that due by said receivers to the first holder or holders of the said certificates.

That this defendant so acquired the said property with notice of the said receiver's certificates outstanding and of all the premises relating to the sums justly due by the said receivers, and defendant has ever since been and now is ready and will-

ing to pay the sums, justly due by the said receiv- 73
ers to the persons lawfully thereunto entitled, but this defendant is advised and charges that this plaintiff is not entitled to receive payment thereof, whoever else may be.

That as this answering defendant is advised, believes and therefore charges, the said property coming into the hands of this defendant as aforesaid is subject to a lien for the amount actually due from the said receiver, Van Valkenburgh, or his successor in the trust on such receiver's certificates but for no other or greater amount, and that this defendant, when it acquired the aforesaid estate and 74
property, succeeded to all the rights of the prior owners of said property, as well as to their obligations, and that in case it be held that a lien against said property be enforceable by this action against the property after the discharge of such receivers, that then this defendant ought to be permitted to assert the rights and equities of those with whom this defendant is in privy in estate.

And for further answer this defendant avers that in accepting the deed of the premises aforesaid from Hazard and Foster, this defendant intended only to pay the amount actually due from the receiver on the said certificates 75
proper interest, and no greater or other sums by way of profit, and said Hazard and Foster incurred no greater obligation in the premises.

That this defendant acquired said property subject to no greater lien in favor of any holder of receiver's certificates than existed against the property in the hands of the receiver, and that amount, when fixed and determined judicially in favor of a definite person, this defendant stands ready and offers to pay to the persons so justly and legally entitled.

That the defendant has, since its purchase afore-

said, expended large sums of money in betterments of the property so purchased, and is daily improving the same and increasing its value. That all the receipts, in excess of actual running expenses, are also being applied in good faith to betterments and improvements on the said railway, and the said property is now worth very much more than when defendants acquired it, and contracts are outstanding and being executed whereby much more will be expended by defendant on said property within the next four calendar months.

Wherefore this defendant asks judgment that the complaint be either dismissed with costs or else that an accounting be had in the premises to determine what amounts are a lien on the property aforesaid and in whose favor, so that the defendant may be fully assured and protected in any payments for account of its shareholders or other persons in interest.

ROBERT LUDLOW FOWLER,
Defendant's Attorney,
6 Wall Street, New York City.

City and County of New York, ss.:

FRANCIS A. WHITE, being duly sworn, says that he is the president of the New York, Rutland and Montreal Railway Company, the defendant above named; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANCIS A. WHITE.

Sworn to before me this 18th day of May, 1886.

CHARLES JANLE,
Commissioner of Deeds,
New York County.

(*From the Record, fol. 2729 of printed book.*) 79

SUPREME COURT.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues, etc.,

*against*

THE AMERICAN LOAN AND TRUST COMPANY, impleaded with ROWLAND N. HAZARD and others.

80

The defendant, the American Loan and Trust Company, appearing in this action by Blair & Rudd, its attorneys, answers the plaintiff's complaint as follows:

FIRST.—This defendant avers, upon information and belief, that subsequently to the sale of the railroad described in the complaint to the defendants, William Foster, Jr., and Rowland N. Hazard, as in the complaint alleged, the said Foster and Hazard duly sold and conveyed the said railroad to the defendant, the New York, Rutland and Montreal Railway Company, which entered into possession thereof and has ever since continued in such possession. 81

SECOND.—That thereafter, and in or about the month of July, 1885, the said defendant, the New York, Rutland and Montreal Railway Company, duly executed and delivered to this defendant, as trustee, a certain indenture of mortgage or deed of trust, whereby, for the purpose of securing the payment of the principal and interest of certain bonds in said mortgage or deed of trust described, it granted, bargained, sold and conveyed to this

82 defendant, as trustee, besides other property, the said railroad mentioned and described in the complaint herein, in trust for the equal *pro rata* use, benefit and security of all persons and corporations that should at any time become or be the lawful owners or holders of any of said bonds, and this defendant accepted the said mortgage or deed of trust and undertook to perform the trust created thereby.

THIRD.—That thereafter, and before the commencement of this action, as the defendant is informed and believes, bonds secured by said mort-
83 gage or deed of trust, or intended so to be, to the amount of $1,400,000 or thereabouts had been actually and in good faith issued and negotiated, which bonds are, as this defendant is informed and believes, now held by *bona fide* purchasers thereof.

FOURTH.—That the holders of a large majority of said bonds have requested this defendant to appear in this action in the interest of all the holders of said bonds, and, as their trustee, to claim and demand the right, as a junior lienor, to be subrogated to the rights of the holders of all of the
84 now outstanding receiver's certificates mentioned in the complaint herein, upon such terms as to this Court shall seem meet and just, and have promised and agreed to provide and furnish to this defendant, upon demand, the means with which to pay such sum or sums of money as this Court shall decree to be paid to the holder or holders of said receiver's certificates.

FIFTH.—That this defendant has no knowledge nor information sufficient to form a belief as to, nor any sources of information from which it can ascertain, the amount of the said receiver's certificates

now outstanding, in the hands of the plaintiff, and 85
the other parties in whose behalf this suit is brought,
or in the hands of any of them, or the amount of
the principal and interest now due thereon, and is
therefore unable to make a tender to the plaintiffs
and such other holders of said certificates, of the
several sums which they may severally be entitled
to receive thereon; and this defendant is advised
and believes that it is entitled to ask that the said
sums may be determined by the judgment and de-
cree of this Court, to the end that this defendant,
on behalf of the said holders of said bonds, may
have an opportunity to pay to the plaintiffs and
the holders of said certificates the sums severally 86
due thereon, and to be subrogated to their rights
under said certificates.

Wherefore, this defendant prays that the several amounts due to the plaintiffs and the other holders of the receiver's certificates mentioned in the complaint, may be ascertained, determined and established by the decree of this Court, and that this defendant may have an opportunity to pay the several sums so ascertained and established, and that the plaintiffs and such other holders may be decreed and directed upon receiving payment as aforesaid to transfer and deliver all of the said cer- 87
tificates so held by them as aforesaid to this defendant, and that this defendant may have such other or further relief in the premises as to the Court shall seem meet.

BLAIR & RUDD,
Attorneys for Defendant,
American Loan and Trust Company,
102 Broadway, N. Y.

88 City and County of New York, ss.:

WILLIAM D. SNOW, being duly sworn, says: I am the secretary of the American Loan and Trust Company, the defendant avove named; I have read the foregoing answer and know the contents thereof, and the same is true of my ow.. knowledge, except as to the matters which are therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

(Signed) W. D. SNOW.

Sworn to before me
89 May 29, 1886.

H. E. DOREMUS,
Notary Public,
Kings County.

Certificate filed in New York County.

90

(*From the Record, folio 2746 of printed book.*) 91

SUPREME COURT.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

Plaintiff,

*against*

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company,

Defendants. 92

*To the Honorable the Supreme Court of the State of New York:*

Your petitioners, Rowland N. Hazard, William Foster, Jr., the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company, defendants in the above-entitled suit, present this their petition for the removal of this suit or controversy to the Circuit Court of the United States for the Northern District of New York, and respectfully show to this Honorable Court as follows: 93

I.—That this suit was begun by the service of a summons only, entitled in this court, and by leaving the same with your petitioner, Rowland N. Hazard, on or about the 8th day of April, 1886, and with your petitioner, William Foster, Jr., on or about the 8th day of April, 1886, and with your

94 petitioner, the New York, Rutland and Montreal Railway Company, on or about the 9th day of April, 1886, and with your petitioner, the American Loan and Trust Company, on or about the 10th day of April, 1886, and your said petitioners have since duly appeared, to wit: Rowland N. Hazard and William Foster, Jr., by Vanderpoel, Green & Cuming, as their attorneys of record, on the 26th day of April, 1886, and the New York, Rutland and Montreal Railway Company by Robert Ludlow Fowler, its attorney of record, on the 10th day of April, 1886; and the American Loan and Trust Company, by
95 Blair & Rudd, its attorneys of record, on the 12th day of April, 1886.

That thereafter, to wit, a copy of the complaint herein was served on the various attorneys of record, but no other proceedings have been had on the part of your petitioners in this action, excepting that the defendant company's time to plead to the complaint has been enlarged and the defendants have answered, the last answer being served on the 9th day of June, 1880, and no term of this court has at any time heretofore been held at which this cause be first tried. That such term will not be held in the ordinary course until the fourth Monday of
96 September next hereafter, as your petitioners are informed and believe.

II.—That the plaintiff is and so was, at the time this suit was begun, a citizen of the State of Massachusetts, that is to say, a banking corporation located in the State of Massachusetts, and having its principal office and place of business in the City of Boston in said State.

That the petitioners, Rowland N. Hazard, and William Foster, Jr., are severally and so were, at the time this suit was begun, citizens of the State of New York, residing in the City of New York.

That the petitioner, the New York, Rutland and 97
Montreal Railway Company, at the time of the commencement of this suit, and ever was, and now is, a citizen of the State of New York, to wit, a corporation duly formed, organized and existing under and by virtue of the Laws of New York.

That the petitioner, The American Loan and Trust Company, at the time of the commencement of this suit, and ever was, and now is, a citizen of the State of New York, to wit, a corporation created, organized and existing under and by virtue of the Laws of the State of New York.

III.—Your petitioners further show that this is a 98
suit of a civil nature in equity, now pending in equity, now pending in this aforesaid Supreme Court of the State of New York, and that the matter in dispute exceeds, exclusive of costs, the sum or value of $500, in which there is a controversy wholly between citizens of different States, to wit, wholly between the plaintiff, a citizen of Massachusetts; and the defendants, citizens of New York, as more precisely hereinbefore alleged.

IV.—Your petitioners further show that they desire to remove this suit from this said State Court 99
to the next Circuit Court of the United States for the Northern District of New York, pursuant to the law in that behalf, and do now before the term of this court, at which the said cause could be first tried, and before the trial hereof, make and file herewith a bond with good and sufficient surety for their entering in such Circuit Court, on the first day of its now next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said Circuit Court, if said Court shall hold that this suit was wrongfully or improperly removed thereto, and also for their appearing and entering

special bail in this suit, if special bail was originally requisite or required therein.

Wherefore, your petitioners pray this Honorable Court to accept this, their petition and the said surety or bond, and to proceed no further in this suit.

Dated New York, September 17, 1886.

R. N. HAZARD.
WM. FOSTER, JR.

NEW YORK, RUTLAND AND MONTREAL RAILWAY COMPANY.

[L. S.] By F. A. WHITE,
President.

Attest: WM. P. WATSON, Secretary.

AMERICAN LOAN AND TRUST COMPANY.

[L. S.] By R. N. HAZARD,
President.

Attest: W. D. SNOW, Secretary.

ROBERT LUDLOW FOWLER,
Of Counsel for Petitioners.

STATE OF NEW YORK, }
City and County of New York, } ss.:

FRANCIS A. WHITE, being duly sworn, says that he is the president of the petitioner and defendant, the New York, Rutland and Montreal Railway Company, and that he has read the foregoing petition and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

FRANCIS A. WHITE.

Sworn to before me this 18th day of September, 1886.

W. F. CHITTENDEN,
Notary Public, Kings County.
Certificate filed in New York County.

UNITED STATES CIRCUIT COURT, 103

NORTHERN DISTRICT OF NEW YORK.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

*against*

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York.

In Equity. 104

This cause having been commenced in the Supreme Court of the State of New York, and having been removed into the Circuit Court of the United States for the Northern District of New York, upon the petition of the defendants Rowland N. Hazard, William Foster, Jr., the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company of New York, and the record of the proceedings in said cause in the said Supreme Court of the State of New York, and upon such removal having been filed in this court, and the said defendants Rowland N. Hazard, William Foster, Jr., the New York, Rutland and Montreal Railway Company and the American Loan and Trust Company of New York having entered their appearance in this cause in this court, 105

It is now, on motion of Robert Ludlow Fowler, attorney and solicitor for the said defendant, the

106 New York, Rutland and Montreal Railway Company,

Ordered, that this cause do now proceed in this court in the same manner as if it had been originally commenced therein.

Dated September 23, 1886.

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(*From the Record, folio 163 of printed book.*)

At a Special Term of the Circuit Court of the United States in Equity sitting,
107 held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the City of Syracuse, on the 24th day of March, 1887.

Present—Hon. WILLIAM J. WALLACE,
Circuit Judge.

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THE CENTRAL NATIONAL BANK OF Boston, which sues as well for itself as for all others similarly
108 situated,

*vs.*

ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York.

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This cause came on to be heard at this term, and was argued by Messrs. Henry D. Hyde and Matthew Hale, of counsel for complainant, and by

Messrs. Robert Ludlow Fowler and Thomas G. 109
Shearman, of counsel for defendants, and thereupon, upon consideration thereof,

It was ordered, adjudged and decreed as follows:

That the certificates of indebtedness issued by John W. Van Valkenburgh, as Receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2d day of April, 1881, made in an action in said Supreme Court, wherein one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, are a lien upon the premises and property described in the 110
bill of complaint herein, in the hands of the defendants herein, and of any persons claiming through or under the defendants Rowland N. Hazard and William Foster, Jr., the purchasers of said premises and property, at a sale thereof made under and in pursuance of the judgment rendered in said action in said Supreme Court on or about the 12th day of January, 1885; and that the complainant The Central National Bank of Boston is the holder and owner of certain of said certificates, amounting in the aggregate to $250,000, of principal thereof, upon which there is now due and unpaid to the complain- 111
ant the said sum of $250,000, with interest at the rate of six per cent. per annum thereon, from the 1st day of January, 1886.

That it be referred to William Lansing, Esq., of the City of Albany, who is hereby appointed a master *pro hac vice* in this cause to examine, ascertain and report who are the holders other than the complainant of said certificates of indebtedness, and how much remains due and unpaid thereon. And the said master is herehy authorized and directed to give notice by advertising in two daily newspapers published in the City of Albany in said District, re-

112 quiring the holders of said certificates to produce the same before the said master at his office in the City of Albany, at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon; and the said master is also authorized and directed to inquire, ascertain and report what would be the just proportion and amount for the said other holders of said certificates to contribute to the expenses of this suit.

That the premises and property described in the
113 bill of complaint in this cause, as hereinafter set forth, or such part thereof as is sufficient to satisfy the amount due and unpaid on said certificates, and expenses of sale and the costs of this suit, and which may be sold separately without material injury to the parties interested, be sold at public auction in the County of Rensselaer in said District by or under the direction of Worthington Frothingham, Esq., who is hereby appointed a Referee for said purpose; that the said Referee give public notice of the time and place of such sale according to law and the practice of this Court; that the complainant or any other party to this suit may become a pur-
114 chaser on such sale; that the said Referee execute to the purchaser or purchasers a deed or deeds of the premises and property sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, the said Referee pay to the complainant or its solicitors the amount of its costs and disbursements to be taxed herein; that he also pay to the complainant or its solicitors the amount due to it on said certificates as aforesaid; together with interest thereon from the 1st day of January, 1886; and that he pay to the holders of the other of said certificates respectively the amount of principal and interest

due thereon, as the same may be found and re- 115
ported by the said master as aforesaid; but if the moneys arising from such sale, after the payment of said costs and expenses as aforesaid, shall not be sufficient to pay the said certificates with interest in full, then that the said Referee pay and distribute the said moneys after the payment of the fees, expenses, costs and disbursements above mentioned, to the said certificate holders, including the complainant, *pro rata*, in proportion to the amount of principal and interest due to said certificate holders respectively; that the said Referee bring the surplus moneys arising from the said sale, if 116
any there shall be, into court within twenty days after the same be received, to be there subject to the order of the Court; that the said Referee make a report of such sale, and file the same with the Clerk of this Court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amaunt due to the complainant as aforesaid, with interest and costs as aforesaid, and also to pay the other certificate holders the amount due to them respectively, as may be ascertained by said master as aforesaid, the said Referee specify the amount of such deficiency in his report of sale, and that the defendants Rowland N. Hazard and William 117
Foster, Jr., pay to the complainant, and to the other of said certificate holders, the residue of the indebtedness on said certificates remaining unsatisfied after the sale of said property and the application of the proceeds pursuant to the directions contained herein; and that the complainant and the other of said certificate holders, to be ascertained as aforesaid, have execution therefor; and that the purchaser or purchasers at such sale be let into possession on the production of the said Referee's deed and a certified copy of the order or decree confirming the said Referee's report of sale.

118 And it is further ordered, adjudged and decreed, that the defendants and all persons claiming under them or any or either of them, after the filing of the notice of pendency of this suit, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said premises so sold or any part thereof. The following is a description of the premises and property hereinbefore referred to and hereby directed to be sold, as contained in a certain mortgage made by the said the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by the
119 deed executed by George McClellan, Referee, to the defendants William Foster, Jr., and Rowland N. Hazard, referred to in the bill of complaint herein:

"All the right, title and interest of the said party of the first part (said Lebanon Springs Railroad Company) of, in and to all and singular the several pieces or parcels of land forming the track or roadway of the party of the first part, from the Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in the Town of Hoosick, in the County of Rensselaer, and all lands thereafter to be acquired for the purpose of forming
120 said track or roadway; also the railroad of the said party of the first part, now built or to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part, connected with said railroad or relating thereto, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow ploughs and scrapers, and all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every

description; all the machine shops and blacksmith 121
shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be and be sold therewith, and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York Railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the 122
Town of Hoosick aforesaid, to the Village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York Railroad belonging or in any wise appertaining, or which may at any time belong or appertain to the same, as well in law as in equity."

Leave is hereby reserved to the complainant and to the other certificate holders above referred to, or any of them, to apply upon the foot of this decree for the appointment of a Receiver to take immedi- 123
ate possession of the property above described, and to keep the same until the sale under this decree shall be consummated by the delivery to the purchaser or purchasers at such sale of a Referee's deed or deeds, and to deliver the property so sold to such purchaser or purchasers, with the powers usually possessed by Receivers in such cases.

WM. J. WALLACE.

124 (*From the Record, folio 2772 of printed book.*)

UNITED STATES CIRCUIT COURT,

NORTHERN DISTRICT OF NEW YORK.

THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for itself as for all others similarly situated,

*against*

125 ROWLAND N. HAZARD, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York.

*To the Circuit Court of the United States in and for the Northern District of New York, in equity sitting.*

126 I, the undersigned, duly appointed by a decree made and entered in the above-entitled cause, at a Special Term of the said Court, held at the Chambers of the Circuit Judge, in the City of Syracuse, on the 24th day of March, 1887, master *pro hac vice* in said cause, and to whom it was referred by said decree to examine, ascertain and report who are the holders other than the complainant of the certificates of indebtedness issued by John W. Van Valkenburg, as receiver of the Lebanon Springs Railroad Company, under and in pursuance of an order of the Supreme Court of the State of New York, bearing date the 2d day of April, 1881,

made in an action in said Supreme Court, wherein 127
one Marvin Sackett was plaintiff, and Russell C. Root and others were defendants, amounting in the aggregate to $350,000, and how much remains due and unpaid thereon, do hereby respectfully report:

FIRST.—That in pursuance of the directions contained in said decree, I gave notice by advertising in two daily newspapers, to wit, the *Argus* and the *Albany Evening Journal*, published in the City of Albany, in said district, requiring the holders of said certificates to produce the same before me, the said master, at my office in the City of 128
Albany, at a time therein designated by me, more than twenty days after the first publication of said notice, to wit, on the seventh day of May, 1887, at ten o'clock in the forenoon, and make proof as to their title thereto and the amount due thereon, copies of which notice, with proof of such publication thereof, are hereto annexed and referred to as a part of this my report.

SECOND.—That at the time and place specified in said notice I was attended by the complainant and its counsel and by other holders of said certificates 129
and their counsel, as will more fully appear by the minutes of the proceedings before me as such master, which are hereto annexed and marked Schedule F., and are referred to as a part of this my report, and upon that day and upon subsequent days to which said hearing was adjourned, testimony was taken and proceedings had before me as such master as will fully appear by said Schedule F.

THIRD.—I find and report that the holders of said certificates of indebtedness and the amounts

130 respectively due thereon, so far as the same have appeared before me, are as follows, viz.:

No. 633. Mrs. Louisa Strait, of Troy, N. Y., is the holder of certificate No. 633 for $500, to which are attached two coupons, due respectively January 1, 1886, and April 1, 1886, the former for $15 and the latter for $7.58. The amount due and unpaid thereupon at the date of this report is five hundred and seventy-eight dollars, to wit, the amount of said certificate and coupons and interest on the principal of said certificate from April 2d, 1886.

131 No. 634. Mrs. Cornelia Hand, of Chatham, N. Y., is the holder of certificate Number 634, for $500, to which are attached similar coupons as to the last mentioned certificate. The amount due and unpaid thereupon at the date of this report is five hundred and seventy-eight dollars, to wit, the amount of said certificate and coupons and interest on the principal of said certificate from April 2d, 1886.

Nos. 657, etc. The Massachusetts Mutual Life Insurance Company, of the City of Springfield, in the State of Massachusetts, is the holder of certificates numbers 657, 698, 655, 656, 654, 653, 652, 651,
132 8, 9, 10, 11, 12, 13, 14, 15, 18, 19, 697, 696, 695, 694, 693, 692, 691, 690, 689, 688, 687, 686, 685, 684, 683, 682, 681, 678, 677, 675, 676, 660, 659, 658, 650, 649, 648, 647, 646, 645, 602, 601, 600, 599, 598, 597, 596, 593, 584, 583, 537, 536, 535, 534, 533, 113, 52, 51, 50, 49, 48, 47, 46, 45, 44, 43, 42, 41, 40, 39, 38, 37, 36, 35, 34, 33, 31, 30, 29, 28, 27, 26, 25, 24, 23, 22, 21, 20, 17, 7, 5, 16, each for $500, upon each of the last above mentioned certificates is due at the date of this report the face thereof, with interest from July 1, 1886, to wit, the sum of five hundred and forty-eight dollars, in all, fifty-four thousand and eight hundred dollars.

There are no coupons attached to these last mentioned certificates. 133

No. 3. Calvin H. Allen, of Number 15 Broad Street, in the City of New York, is the holder of certificate Number 3, for $500, with coupons attached thereto, Nos. 6, 7, 8, 9, 10 for $15 each, and No. 11 for $7.58. There is due upon this certificate the face thereof, with interest thereupon from April 2d, 1886, and the amount of said coupons, amounting altogether at the date of this report to six hundred and thirty-eight dollars.

Nos. 4, 32, 636. Francis & Loutrell, of Maiden Lane, in the City of New York, are the holders of certificates Nos. 4, 32 and 636, each for $500, one coupon (Number 11) for $7.58 being attached to each. 134

There is due and unpaid thereupon the face of said certificates, with interest thereupon from April 2d, 1886, and the amount of said coupons, amounting in all at the date of this report to sixteen hundred and eighty-nine dollars, the sum of five hundred and sixty-three dollars being due upon each of said certificates.

Nos. 585, etc. Peter W. French, of Boston, in the State of Massachusetts, is the holder of certificates Numbers 585, 586, 587, 588, 589, 590, 591, 592, 594 and 595, each for $500, to which certificates no coupons are attached. There is due and unpaid upon each of these certificates the face thereof, with interest thereupon from April 2d, 1886, amounting at the date of this report to the sum of five hundred and fifty-five dollars and forty-two cents upon each of said certificates, the whole amount due upon said certificates being fifty-five hundred and fifty-four dollars and twenty cents. 135

Nos. 83, etc. Peter Butler, as receiver of the Pacific National Bank of Boston, is the holder subject to a pledge thereof to Lewis Coleman and John

136 Shepard of Boston, to protect them against their liability upon a bond given to dissolve an attachment issued in a suit brought against said Bank prior to the appointment of the receiver, of certificates Nos. 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109,110, 111, and 112, each for $500.

To each of these there is a coupon attached for $7.58.

There is due and unpaid upon them the amount thereof with interest thereupon from the maturity thereof and the amount of said coupons, in all
137 amounting at the date of this report to the sum of sixteen thousand eight hundred and ninety dollars, the sum of five hundred and sixty-three dollars being due upon each of said certificates.

Nos. 114, etc. S. R. Dickson, of No. 2 Wall Street, in the City of New York, is the holder of certificates Nos. 114, 115, 116,117,118, 119, 120,121, 122, 123, 124, 279, 282, 437, 438, 439, 440, 539, 540, 541, 280, 281, 441, 442, 635, 637, 639, 640, 6, 538, 542, for $500 each. To these certificates, no coupons are attached. There is due and unpaid upon them the amount thereof, with interest thereupon from the second day of April, 1886, amounting, at the date
138 of this report to the sum of seventeen thousand one hundred and sixty-two dollars and sixty cents, the sum of five hundred and fifty-five dollars and forty-two cents, being due upon each of said certificates.

Nos. 680 and 699. Mrs. Esther K. Carter, of the City of Albany, in the State of New York, is the holder of Nos. 680 and 699 for $500 each, to each of which are attached coupons for interest due April 2, 1886, $7.58. There is due and and unpaid upon these certificates the principal thereof, with interest thereupon from April 2, 1886, besides the amount of the said coupons thereto annexed, amounting in all at the date of this report to the sum of eleven

hundred and twenty-six dollars, the sum of five 139
hundred and sixty-three dollars being due upon each of said certificates.

No. 700. Mrs. H. N. Wright, of Chatham, Columbia County, N. Y., is the holder of certificate No. 700 for $500 to which are attached two coupons, one due January 1, 1886, and the other April 2, 1886, for $15 and $7.58, respectively. There is due thereupon the principal of said certificate and interest thereupon at six per cent. per annum, from the second day of April, 1886, besides the amount of said coupons, amounting in all to the sum five hundred and seventy-eight dollars, at the date of 140
this report.

Nos. 1 and 2. The estate of Cyrus S. Loutrell, deceased, is the owner and holder of certificates Nos. one and two for $500 each, to each of which are attached coupons Nos. 6 to 11, both numbers inclusive. There is due upon these certificates the amount of $500 each principal and the amounts of the coupons, viz.: $15 upon each of the first five coupons and $7.58 upon the sixth coupon upon each bond, together with interest upon the principal from second day of April, 1886, amounting in all at the date of this report to twelve hundred and seventy-six dollars, the sum of six hundred and thirty-eight 141
dollars being due upon each of said certificates.

Nos. 643 and 644. Mrs. Benjamin C. Gilbert, who resides at No. 291 State Street, in the City of Albany, N. Y., is the owner and holder of certificates Nos. 643 and 644 for $500 each, to each of which are attached coupons Nos. 10 and 11, which coupons fell due on January 11, 1886, for $15.00, and the other April 2, 1886, for $7.58. The amount due upon these last mentioned certificates is the principal thereof, and the amount of said coupons and interest upon the principal from April 2, 1886, amounting in all at the date of this report to

142 eleven hundred and fifty-six dollars, the sum of five hundred and seventy-eight dollars being due upon each of said certificates.

No. 638. John H. Van Tine, of Fishkill Landing, N. Y., is the owner and holder of certificate No. 638, to which no coupons attached. The amount due upon this certificate is the principal thereof, viz., five hundred dollars, with interest thereupon from the 2d day of April, 1886, at the rate of six per cent per annum, amounting in all at the date of this report to five hundred and fifty-five dollars and forty-two cents.

It further appeared before me that William C.
143 Van Alstyne, of the City of Albany, N. Y., is the owner of one of said certificates, but that the said certificate was not presented to me as such master, nor was any proof made as to the number thereof or the amount due thereon.

And I further find and report that Francis A. White, of the City of New York, is the holder of coupons maturing January 1, 1886, on said receiver's certificates of the Lebanon Springs Railroad Company, numbered as follows:

Certificate No. 5.

Certificates Nos. 7 to 31, both numbers inclusive.

144 " " 33 to 52, " " "
" " 113,
" " 533 to 537, " " "
" " 583 to 584, " " "
" " 593,
" " 596 to 602, " " "
" " 645 to 660, " " "
" " 675 to 678, " " "
" " 681 to 698, " " "

Also of coupons maturing April 2, 1886, being coupons No. 11 on the same certificates last above mentioned.

Also coupon No. 10 on certificates Nos. 679, 680 and 689, and of coupon No. 10 on certificate No. 4. 145

Also of coupon No. 10 on certificates Nos. 32, 636, and coupon No. 10 on certificates Nos. 585 to 592, both numbers included, and coupon No. 10 on certificates Nos. 594 and 595.

Also of coupons Nos. 10 and 11 on certificate No. 638, and of coupon No. 10 on certificate No. 6.

Also of coupon No. 10 on certificates Nos. 114 to 124, both numbers included; on certificates Nos. 279 to 282, both numbers included; on certificates Nos. 437 to 442, both numbers included; on certificates Nos. 538 to 542, both numbers included; on certificates Nos. 635 and 637, and on certificates 639 and 640. 146

Also of coupon No. 11 on certificate No. 6, on certificates Nos. 114 to 124, both numbers inclusive; on certificates Nos. 279 to 282, both numbers included; on certificates Nos. 437 to 442, both numbers included; on certificates Nos. 538 to 542, both numbers included; on certificates Nos. 635, 637, 639 and 640; on certificates Nos. 585 to 592, both numbers included; on certificates numbered 594 and 595.

Also of coupon No. 10 on certificates Nos. 83 to 112, both numbers included; on certificates Nos. 53 to 82, both numbers included; on certificates 125 to 199, both numbers included; on certificates Nos. 200 to 278, both numbers included; on certificates 283 to 399, both numbers included; on certificates Nos. 400 to 436, both numbers included; on certificates Nos. 443 to 532, both numbers included; on certificates Nos. 543 to 582, both numbers included; on certificates Nos. 603 to 632, both numbers included; on certificates Nos. 641 and 642. 147

That there is due and unpaid at the date of this report upon said coupons the sum of nine thousand

148 seven hundred and sixty-one dollars and thirty-six cents.

And I further find in regard to the last-mentioned coupons held by Francis A. White that said coupon No. 10 from the certificates owned and held as aforesaid by the complainant, the Central National Bank of Boston, and mentioned in Schedule M, annexed to the testimony herein, were paid by Roger N. Allen acting as agent of the American Finance Company before their maturity, to the said complainant, and that no transfer was taken by said Allen, as such agent, of said coupons upon such payment.

That the said coupons so paid to complainant were afterwards transferred to said White by the
149 said Finance Company.

And I further find as a conclusion of law that the said Francis A. White is entitled to be paid the amount of said coupons out of any surplus of the proceeds of sale in this case remaining after the payment of the amount due upon the certificates held by the complainant and by the receiver of the Pacific National Bank of Boston, and after the payment of the amount of the certificates held by other parties than said complainant and said receiver so far as relates to the coupons from certificates held by said bank; but that as to the coupons from certificates held by said other parties and which were not paid to the complainant, the said holder is entitled to share *pro rata* in the proceeds of the
150 said sale.

And I further report that the matter of the just proportion and amount for the holders of the said certificates other than the complainant to contribute to the expense of this suit, is postponed until after the sale has taken place pursuant to the decree, as such amount cannot be ascertained and determined until after such sale. All of which is respectfully submitted.

Dated February 7, 1888.

WILLIAM LANSING,
Master.

(*From the Record, folio 435 of printed book.*)

At a Special Term of hte Supreme Court of New York, held at the Town Hall in the Village of Saratoga Springs, on the 10th day of November, 1891. 1

Present — HON. JOHN R. PUTNAM, Justice.

AARON R. STEVENS, HARPER W. ROGERS, NANCY E. WILBUR, ANDREW A. DOUGLAS, as trustee under the last will and testament of WILLIAM HENRY DOUGLAS, deceased, and IDA S. HARRISON. 2

Plaintiffs,

AGAINST

THE UNION TRUST COMPANY OF NEW YORK, James C. Hull, William Butler Duncan, John G. McCullough, as adminstrator of the goods, chattels and credits of Trenor W. Park, deceased; The New York, Boston and Montreal Railway Company, Jesse Seligman, John Crosby Brown, William Watts Sherman, Daniel Butterfield, as receiver of the property of the New York, Boston and Montreal Railway Company; Marvin Sackett, Russell C. Root, the Harlem Extension South Coal Transportation Company, the Central National Bank of Boston; Peter Butler, as receiver of the property of the Pacific National Bank of Boston; The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van 3 4

Judgment 10th November, 1891.

Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company, and William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwell, John H. Cheever, Charles H. Dewing, John A. Nichols, Henry A. Tweed, as surviving trustee of the creditors and stockholders of the New York Loan and Indemnity Company, Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Edmund N. Converse, S. Lothrop Thorndyke, William F. Glidden, Ezra H. Baker, Philip L. Moen, H. A. Whiting, and Eustace C. Fitz, and William D. Shipman, as assignee of William Butler Duncan,

Defendants.

On reading and filing the affidavit of Edward Winslow Paige, one of the attorneys for the plaintiffs, and of George O. Vander Bogert, proving the service of the summons and complaint upon the defendants, the Union Trust Company of New York, Jesse C. Hull, the New York, Boston and Montreal Railway Company, William Watts Sherman, Marvin Sackett, Russull C. Root, the Harlem Extension Railroad South Coal Transportation Company, William H. Foster, Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, Timothy Cornwall, John H. Cheever, Charles H. Dewing, John A. Nichols and Henry A. Tweed, more than twenty days since; and also proving that no one of the above-named defendants have appeared, or put in any answer or demurrer to the complaint in the action; and also proving that due notice of the pendency of this action was filed

in the offices of the clerks of Rensselaer and Columbia counties on the 10th day of October, 1887, and that another due notice of pendency of this action was duly filed in said offices on th 24th day of September 1888, and the Court having computed the amount due on the various bonds and mortgages and receiver's certificates hereinafter referred to and having taken proof of the facts and circumstances stated in the complaint, by which computation and proof, it appears that the several amounts hereinafter stated are due upon this 10th day of November, 1891, and that the facts hereinafter stated are true.

And it further appearing to the Court that the following defendants have appeared and put in answers to the complaint, namely: the defendant William Butler Duncan, by his attorney, Solomon Hanford; the defendant, John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased, by his attorneys, Jennings & Russell; the defendants, Jessie Seligman and John Crosby Brown, by their attorneys, Bangs, Stetson, Tracy and MacVeagh, the defendant, Daniel Butterfield, as receiver, by his attorneys, Deady and Goodrich; the defendant, the Central National Bank of Boston, Peter Butler, as receiver of the property of the, Pacific National Bank of Boston; the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White Mary Gilbert and Sarah Gilbert, by their attorneys, Hale and Bulkley; the defendants William Foster, Jr. and Rowland N. Hazard, by their attorney, John Yard; the defendant, the New York, Rutland and Montreal Railway Company, by its attorneys, Vanderpool, Green and Cuming; the defendant, The American Loan and Trust Company, by its attorney, Delos McCurdy; the defendants, Royal E. Robbins, Barthold Schlesinger, Francis Bartlett, Elmund N. Converse, S. Lothrop Thorndyke, William Gladden, Ezra H Baker, Philip I. Moen, H. A. Whiting and Eustace C. Fitz, by their attorney, Robert Ludlow Fowler; and the defendant, William D. Slipman, as assignee, by his attorney, Peter T. Barlow, and

the issues thus made having been regularly brought on for trial at a Special Term of this Court, held at the Court House in the City of Troy, on the first Monday of May, 1891, and the same Special Term having been adjourned to be held at the Town Hall, in the village of Saratoga Springs, on the ninth day of June, 1891, and the said issues having been then so tried by virtue of such adjournment and of the written stipulation of the parties, and the Court having made and filed its decision thereon in writing, containing the following findings of fact and conclusions of law and directions for judgment, that is to say:

## Facts.

1.—That the Lebanon Springs Railroad Company became and was created a duly organized and existing corporation under and by virtue of the laws of the State of New York, by the filing of its articles of incorporation or association on the twenty-fifth day of March, one thousand eight hundred and fifty-two, and by the provisions of the following acts of the Legislature of the State of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An Act to authorize the Lebanon Springs Railroad "Company to construct an extension of its road into "Massachusetts and Vermont, and to provide means "therefor," passed March 8th, 1853, and being Chapter 25 of the Laws of that year;

"An Act to amend an Act entitled "An Act to "to authorize the Lebanon Springs Railroad Company "to construct an extension of its road into Massachusetts "and Vermont, and to provide means therefor," passed "March 8th, 1853," passed June 24th, 1853, and being Chapter 461 of the Laws of that year;

"An Act to enable certain connecting railroad com-"panies to aid in the construction of the Lebanon "Springs Railroad," passed April 13th, 1855, and being Chapter 350 of the Laws of that year;

"An Act to extend the time for the completion of the "Lebanon Springs Railroad," passed April 12th, 1860, and being Chapter 285 of the Laws of that year;

"An Act to extend the time for the completion of "the Lebanon Springs Railroad," passed April 22d, 1862, hnd being Chapter 444 of the Laws of that year;

"An Act to amend the charter of Lebanon Springs "Railroad Company," passed April 9th, 1864, and being Chapter 145 of the Laws of that year;

"An Act to authorize any town in the Counties of "Columbia and Rensselaer to aid in the completion of "the Lebanon Springs Railroad," passed April 4th, "1866, and being Chapter 373 of the laws of that year;

"An Act to extend the time for the completion of "the Lebanon Springs Railroad," passed 26th February, 1867, and being Chapter 46 of the laws of that year;

And by virtue of the same it became vested with all the powers and franchises of corporations stated in the Revised Statutes of New York, and of railroad corporations stated in "An Act to authorize the formation of Railroad Corporations, and to regulate the same," passed by the Legislature of New York, April 2d, 1850, and the several acts amendatory thereof and supplementary thereto, and with power to purchase, construct and operate during the period of its corporate existence, and of any extensions or renewals thereof, the railroad hereinafter described, extending from Chatham Four Corners, in the County of Columbia, northerly through the Counties of Columbia and Rensselaer to the borders of the State at Bennington, and also with the certain other special and particular powers and franchises stated in the above Acts, and also all the following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the managing of the business thereof, which it might do if that part were within the State of New York.

22 To create preferred stock at such a rate of dividend, or interest, and with such securities therefor, as it might deem expedient.

To extend its road by construction or purchase into the States of Vermont and Massachusetts as far as is or may be permitted by the authority of said States.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such terms as the parties
23 should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate either itself alone, or after consolidation with any other company into a single corporation, with any company having a railroad or the right to construct a railroad which, or a portion of which, should be in the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad com-
24 panies mentioned in the Act entitled "An Act to authorize the consolidation of certain railroad companies," passed by the Legislature of New York, April 2 l, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which it might construct or acquire within the States of Vermont and Massachusetts, as it might exercise if the same were wholly within the State of New York.

To have its stock and bonds taken and owned or
25 guaranteed by any company having or being authorized to construct a railroad connecting with the line of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of its railroad from

the Massachusetts State line as declared in its articles of 25
association to any point within the town of Hoosick, in the County of Rensselaer, or the town of White Creek, in the County of Washington.

To construct a branch to a terminus at the Vermont State line at a point of junction with the western Vermont Railroad, now known as the Bennington and Rutland Railway.

To construct a branch with a terminus in either or both of the cities of Albany and Troy, with the same 26
effects as if the line of the said company had been originally fixed in its articles of association both as to its main line and branches as the same are last above described, and the termini thereof had been its original terminus.

That by virtue of the following acts which were duly passed by the Legislature of the State of Vermont, to wit:

"An Act to incorporate the Vermont and New York "Railroad Company," approved November 2, 1885, and 27
being No. 134 of the laws of that year:

"An Act to amend an Act entitled 'An Act to incor-"'porate the Vermont and New York Railroad,' approved November 2, 1865," approved November 19, 1866, and being No. 167 of the laws of that year;

"An Act authorizing the Bennington and Rutland "Railroad Company to consolidate their road with the "road of the Lebanon Springs Railroad Company," approved November 21, 1867, and being No. 155 of the 28
laws of that year;

"An Act to enable the Bennington and Rutland "Railroad Company to aid in obtaining necessary rail-"road connections," approved March 28th, 1867, and being No. 2 of the special session laws of that year — the Vermont and New York Railroad Company was inporated with the powers and franchises of railroad corporations under the laws of Vermont, and to build, own and operate a railroad from Bennington to the Vermont

29 State line, being that portion of the railroad hereinafter described which is within the State of Vermont, and to transfer and convey such powers and franchises and any property to the said Lebanon Springs Railroad Company, and to consolidate, by a vote of a majority of its stockholders. with the Lebanon Springs Railroad Company.

That said company was duly organized, and its road duly located and the construction thereof commenced.

That afterwards, on or about the twentieth day of
30 August, 1867, the Vermont and New York Railroad Company, by its deed of conveyance of that date, in all respects duly authorized, executed, acknowledged and recorded, and in accordance with the laws of the State of Vermont, did duly convey and confirm unto the Lebrnon Springs Railroad Company the said Vermont and New York Railroad so located as aforesaid, with all its privileges and appurtenances and all the rights and franchises of said Vermont and New York Railroad Company.

31 The Lebanon Springs Railroad Company constructed said railroad from Chatham to Bennington, hereinafter described, including the completion of the Vermont and New York Railroad, and completed the same and opened it to the public early in the year 1869, and, except as otherwise hereinafter alleged, has always and ever since operated the same as a railroad.

And it also became possessed and the owner of the following described property, to wit: All and singular
32 the track or roadway of the Lebanon Springs Railroad, from the Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in town of Hoosick, in the County of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said the Lebanon Springs Railroad Company already built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and

also all the tolls, incomes, rents, issues and profits of 33
any and all of the same, and of any and all of the above mentioned powers and franchises; and also all the rolling-stock, locomotives: tenders, snow-ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York Railroad, constructed from the terminus of the railroad last above 34
described in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the equipment and all the above mentioned powers and franchises of the said Vermont and New York Railroad Company belonging to or in any wise appertaining to, or which may at any time belong or appertain, or have belonged or appertained to the same or either of said railroads or companies, as well in law as in equity; including also the property of every kind, name or nature of, or purchased by or in the possession 35
of the Lebanon Springs Railroad Company, the Vermont and New York Railroad Company, and John W. Valkenburgh as Receiver, and including also all property, powers and franchises of every name or nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867.

That none of the above mentioned rights, powers and franchises have lapsed, been lost, forfeited or expired, 36
but all of the same are still in full force and life, and subject to the lien of the above mortgage, and will pass in like full force and life to any purchaser or purchasers on a sale under such mortgage, and to any new corporation organized by such purchaser or purchasers, pursuant to the laws of New York.

That the Lebanon Springs Railroad Company possessed and enjoyed all the powers, rights and franchises above mentioned, until it became consolidated with the

Bennington and Rutland Railroad Company as hereinafter described.

That on the first day of July, 1867, the said Lebanon Springs Railroad Company duly issued and sold its bonds to the amount of two millions of dollars to individuals and to towns.

That to secure the payment of said bonds the said Lebanon Springs Railroad Company, on the first day of July, 1867, duly executed and delivered to the defendant the Union Trust Company of New York, a corporation organized and then and still existing under the laws of New York, its certain mortgage bearing date on that day, whereby it duly mortgaged all its property, rights, powers and franchises hereinabove stated to the said Union Trust Company of New York, in trust, to secure the payment of the said bonds.

That said bonds bore interest at the rate of seven per centum per annum, payable on the first day of January and July in each year, and the principal in thirty years from the date thereof.

That said mortgage was at the time of the foreclosure and sale hereinafter mentioned the first mortgage and lien upon all the said property, powers and franchises, and contained a proviso in substance the same as the condition of the said bonds, and with power and authority in case of default in the payment of the principal, or of the interest thereon, as therein specified, to sell the said mortgaged property in due form of law; and also contained in the following:

"And should the said trustee fail to forthwith take "possession of said railroad and the mortgaged property "the same as hereinbefore authorized, any holder of "any of said bonds secured by this mortgage may ap- "ply in behalf of himself and the other holders of the "bonds hereby secured, to the Supreme Court on notice "to the party of the first part and to the said trustee "under this mortgage or its successors, by action or "otherwise as the said Court may direct, for the ap-

"pointment of a receiver of the said mortgaged prem-
"ises and property, and on such application the said
"Supreme Court may appoint such receiver with powers 41
"as are herein conferred upon said trustees, and as apper-
"tain to receivers in such cases, and said trustee shall have
"the like power to apply for a receiver, and should the
"said trustee neglect or refuse after January first, one
"thousand eight hundred and sixty-nine, to institute an
"action for the foreclosure of this mortgage, or to prose-
"cute such action or the proceedings for such sale with
"due diligence, it shall be lawful for any holder of the
"bonds hereby secured to apply in behalf of himself and
"the other holders of said bonds to the said Supreme 42
"Court on notice to the party of the first part, and to
"said trustee or its successors by action or otherwise, as
"the said Supreme Court shall direct, for a sale of said
"mortgaged premises, and on such application it shall be
"lawful for the said Court to order such sale according
"to the course of practice of said Court in cases of fore-
"closure of mortgages. But in case of such application
"or action by any bondholder for a receivorship, or for a
"sale, it shall not be lawful for any bondholder to make
"a similar application or to bring a similar action while 43
"said first mentioned application or action or proceeding
"therein or thereunder is or are pending."

That the plaintiff Stevens is the owner of and holder of said bonds to the amount of three thousand, one hundred dollars stated at par value of principal of the same. That the plaintiff, Rogers, is the owner of said bonds to the amount of $1,00 stated at par value of the principal of the same, and has been such owner and holder ever since the year 1867, That the plaintiff Wilbur is the owner and holder of said bonds to the amount of $1,000, 44 stated at par value of the principal of the same, and that she inherited the same from her sister, Elvira E. Peabody, 21 August, 1881. That the plaintiff Douglas, as Trustee under the last will and testament of William Henry Douglas, deceased, is the owner and holder of said bonds to the amount of $12,000, stated at par value of the principal of the same, and as such trustee has been

45 owner and holder ever since 1875. That the plaintiff Harrison is the owner and holder of such bonds to the amount of $50,000, stated at par value of the principal of the same.

That no part of the interest thereon nor upon any of said bonds has been paid since the year 1870.

That early in the year 1870 the Lebanon Springs Railroad Company duly consolidated its road, franchises and property with the road, franchises and property of the Bennington and Rutland Company, a corporation
46 therefore duly organized and existing under the laws of the State of Vermont and owning and operating a railroad from Bennington in that state, where it connected with the railroad of the Lebanon Springs Railroad Company, to Rutland, in said state, and also a branch two miles long running from North Bennington westerly to the New York State line, and one company was thus formed of said two companies under the name of the Harlem Extension Railroad Company, which said last-named corporation became entitled to all and singular the
47 rights, properties and franchises of said two railroad companies, and subject to all their and each of their respective liabilities.

That afterwards and on the first day of April, 1870, the said Harlem Extension Railroad Company executed its certain bonds, amounting in aggregate to the sum of four millions of dollars, and bearing interest at seven per centum per annum, of which, however, only the sum of one million five hundred thousand dollars
48 were issued, and at the same time and to secure the payment of the said bonds, it executed to the Union Trust Company of New York a mortgage upon all its property, roads and franchises, which contained a proviso, in substance the same as the conditions of the said bonds. The remainder of the said bonds of the said Harlem Extension Railroad Company, being two millions five hundred thousand dollars thereof, were reserved to take up and be exchanged for the two million dollars of bonds of the Lebanon Springs Railroad

Company, before mentioned, and five hundred thousand dollars of bonds which had been issued by the said Bennington and Rutland Railroad Company, but such bonds of the Lebanon Springs Railroad Company were never surrendered or exchanged, but accordingly only one million five hundred thousand dollars of the said bonds of the Harlem Extension Railroad Company were ever issued as above stated. 49

That the plaintiff Stevens is the owner and holder of said bonds to the amount of five thousand dollars, stated at par value of the principal of the same; and that the plaintiff, Douglas, as Trustee under the last will and testament of William Henry Douglas, deceased, is the owner and holder of said bonds to the amount of $1,000, stated at par value of the principal of the same. 50

That the interest upon the said bonds of the Lebanon Springs Railroad Company was paid up to and including that due in January, 1869, but that nothing had ever been paid upon any of them since, and nothing at all has been paid upon any of the bonds issued by the Harlem Extension Railroad Company. 51

That both said mortgages were duly recorded in the Clerk's offices of the Counties of Columbia and Rensselaer according to the laws of the State of New York, and in the County of Bennington, in the State of Vermont, according to the laws of the State of Vermont.

That on the 22d day of February, 1872, The Union Trust Company of New York began an action in the Supreme Court of New York to foreclose the said mortgage, executed by the said Lebanon Springs Railroad Company, by reason of the aforesaid default in the payment of interest thereon, in which action the Lebanon Springs Railroad Company, the Harlem Extension Railroad Company, William Butler Duncan, and James B. Hodgskin were made defendants. That due notice of the pendency of said action, according to law and the practice of that Court, was duly filed in the offices of the Clerks of the Counties of Rensselaer and Columbia on the 24th day of February, 1872, and that all the defend- 52

53 ants in such action were duly and regularly served with the process of this court, and subjected to the jurisdiction thereof, and duly and regularly appeared in such action therein, prior to the first day of May, 1872.

That on or about the 15th November, 1872, it filed bills in the Court of Chancery of the State of Vermont to foreclose both of the said mortgages, in which actions the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company were made defendants, which defendants were regularly served with pro-
54 cess and submitted to the jurisdiction of, and appeared in that court, in both such actions, prior to the first December, 1872.

While the above-mentioned actions were pending, and on the 18th December, 1872, the Harlem Extension Railroad Company, and the Pine Plains and Albany Railroad Company, a corporation duly organized under the laws of the State of New York, duly consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of the Harlem
55 Extension Railroad Company; and certain other railroad companies then existing under the laws of the State of New York, namely, the New York and Boston Railroad Company, the Putnam and Dutchess Railroad Company and the Dutchess and Columbia Railroad Company, on the 18th December, 1872, duly consolidated their roads, property, franchises and capital stock and thus formed one company under the name of the New York, Boston and Northern Railway Company, and afterwards and by an agreement made the 19th Decem-
56 ber, 1872, but not filed in the office of the Secretary of State of New York until 21st January, 1873, the said last-named the Harlem Extension Railroad Company and the New York, Boston and Northern Railway Company duly consolidated their roads, property, franchises and capital stock, and thus formed one company under the name of the New York, Boston and Montreal Railway Company, which is one of the defendants herein.

That such several consolidations were legal and duly

and strictly in accordance with the laws of New York 57
and Vermont, and the defendant. the New York, Boston and Montreal Railway became thereby the owner of and entitled to all the roads, property and franchises of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, as hereinbefore stated, subject to the said mortgage given by the Lebanon Springs Railroad Company and also of all the other mortgages above named, and subject to all of their and each of their respective liabilities, and to the pendancy of said actions.

58

That the above mentioned foreclosure suits were proceeded with, and such proceedings had therein that, in the said action in the Supreme Court of New York, judgment of foreclosure of the said mortgage given by the Lebanon Springs Railroad Company, and for a sale of all the road, property, powers and franchises of the Lebanon Springs Railroad Company within this State, was duly rendered by said court in that action, and was on the same day duly entered in the Clerk's office of Rensselaer County, which said judgment is in the words 59
and figures following :

60

61 "At a Special Term of the Supreme Court of the State of New York, held at the Court House, in the City of Troy, County of Rensselaer, on the 10th day of December, 1872.

Present—Hon. WILLIAM L. LEARNED, Justice.

UNION TRUST COMPANY OF NEW YORK,
62 as Trustee,
AGAINST
THE LEBANON SPRINGS RAILROAD COMPANY, The HARLEM EXTENSION RAILROAD COMPANY, WILLIAM BUTLER DUNCAN, JAMES D. HODGSKIN.

On reading and filing the affidavit of S. T. Fairchild,
63 attorney for the plaintiff in this action, proving the service of the summons and notice of object of suit in this action, and the affidavit of said attorney for the plaintiff that no answer or demurrer has been put in to the complaint in said action, and that due notice of the pendency of this action was duly filed in the offices of the Clerks of the Counties of Rensselaer and Columbia, on the 24th day of February, 1872, and on reading and filing the report of the Referee to whom it was referred by an order of this Court to compute the
64 amount due and to become due to the plaintiff upon the bonds and mortgages mentioned and set forth in said complaint, by which report, bearing date the 10th day of December, 1872, it appears that the sum of five hundred and fifty-two thousand two hundred and twenty-two dollars and twenty-two cents was actually due upon said bonds and mortgage at the date of said report for interest, and that the further sum of two millions of dollars will become due to said plaintiff on the first day of July, 1891, for principal upon

said bonds and mortgage, besides interest thereon from 65
the date of said report; and on motion of S. T. Fairchild, attorney for the plaintiff,

It is ordered, that the said report be and the same hereby is in all things confirmed, and on like motion as aforesaid, it is adjudged that the mortgaged property and premises described in the complaint in this action as hereafter set forth, be sold together and not separately, at public auction in said County of Rensselaer, by or under the direction of Charles S. Fairchild, who is hereby appointed as Referee for that purpose; and the said 66
Referee give public notice of the time and place of such sale according to law and the practice of this Court; that either of the parties to this action may purchase at such sale; that the said Referee execute to the purchaser or purchasers a deed or deeds of the property and premises sold; that out of the moneys arising from such sale, after deducting the amount of his fees and expenses on such sale, and any lien or liens upon said premises so sold at the time, he pay to the plaintiff, or its attorney, the sum to be taxed hereby adjudged to the plaintiff for 67
costs and charges in this action with interest from the date hereof, which costs have this day been adjusted and taxed by the Clerk of said County of Rensselaer, at ninety-seven dollars and forty-nine cents, and that he also pay to the plaintiff the amount so reported due as aforesaid, together with the legal interest thereon, from the date of the said report, or so much as the purchase money of the mortgaged premises will pay of the same, take a receipt therefor and file it with his report of sale; and he deposit the surplus (if any) with the Union Trust 68
Company of New York to the credit of this action, to be drawn only on the order of this Court, signed by the Clerk and Judge thereof, within five days after he receives the same; that he make a report of such sale and file it with the Clerk of this Court with all convenient speed; that if the proceeds of such sale be insufficient to pay the amount so reported due to the plaintiff, with the interests and costs as aforesaid, the said Referee specify the amount of such deficiency in his report of

69 sale, and that the defendant, the Harlem Extension Rail-road Company, pay the same to the plaintiff, and that the purchaser or purchasers at such sale be let into possession on production of the said deed.

And it is further adjudged that the defendants and all persons claiming under them, or any or either of them, after the filing of the aforesaid notice of pendency of this action, be forever barred and foreclosed of all right, title, interest and equity of redemption in the said mortgaged premises so sold, or any part thereof.

70 The following is a description of the mortgaged property and premises hereinbefore mentioned, as contained in said mortgage, viz.: "All the right, title and interest of the said party of the first part of, in and to all and singular the several pieces or parcels of land forming the tract or roadway, of the party of the first part, from the Chatham Four Corners, in the County of Columbia, to the East line of the State of New York, in the Town of Hoosick, in the County of Rensselaer, and all lands 71 hereafter to be acquired for the purpose of forming said tract or roadway, also the railroad of the said party of the first part now built and to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits and alienable franchise of the said party of the first part connected with said railway or relating thereto, including its rights and franchises as a corporation; and also all the rolling-stock, locomotives, 72 tenders, snow-plows and scrapers, all the passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops, and all the articles used in the construction, repairing and replacing of roads and cars, and in the running of the cars now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be and be sold therewith and not seperate therefrom, and to be

taken as a part thereof; and also all the right, title and 73
interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York Railroad, constructed or to be constructed, from the terminus of the railroad of the party of first part in the town of Hoosick aforesaid, to the Village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in an to the franchise and equipment of the said Vermont and New York Railroad belonging or in any wise appertaining or which may at any time belong or appertain to the 74
same as well in law as in equity.

Grated Dec. 10th, 1872.

W. L. L.

Filed Dec. 10th, 1872, at 11 h. 30 a. m."

Under said judgment, the property and franchises therein described were sold on the 25th day of January, 1873, by Charles S. Fairchild, a Referee duly appointed by said Court in that behalf, at Greenbush, in the County of Rensselaer, to the defendant, William Butler Duncan, 75
for the price of one hundred thousand dollars, and said Referee thereupon, by direction of the said Duncan, executed and delivered to the defendant, James C. Hull, his deed of the said road, property and franchises, bearing date the said 25th January, 1873, and said deed was duly recorded in the Clerk's office of Rensselaer and Columbia Counties.

On the seventh day of December, 1872, a decree of foreclosure of the same mortgage, and also a decree for 76
the foreclosure of the Harlem Extension mortgage, and directing a sale of all the roads, property, powers and franchises within the State of Vermont, of the Lebanon Springs Railroad Company and the Vermont and New York Railroad Company, as set forth in the first finding above, were duly passed by the Court of Chancery of Vermont, and enrolled and filed in that Court as aforesaid; that said decree in the first of such actions was in the words and figures following:

77 "Decree.

BENNINGTON COUNTY.

STATE OF VERMONT,

DECEMBER TERM.

THE UNION TRUST COMAANY OF NEW
78 YORK

AGAINST

THE HARLEM EXTENSION RAILROAD COMPANY and THE LEBANON SPRINGS RAILROAD COMPANY.

} In Equity.

## Decree.

79 And now upon the orator's bill in this cause on file, setting forth the charter of the Vermont and New York Railroad Company, the location and partial construction of the Vermont and New York Railroad, extending from the Village of Bennington, in the County of Bennington, to the State line between Vermont and New York, at Hoosick, in the County of Rensselaer and State of New York; the due conveyance of said road to the Lebanon Springs Railroad Company, its completion so as to connect the Lebanon Springs Railroad at said Hoosick with
80 the Bennington and Rutland Railroad at Bennington; the consolidation of the stocks, franchises and property of said Lebanon Springs Railroad Company and of said Bennington and Rutland Railroad Company, and the formation thereby of the Harlem Extension Railroad Company; the execution by the said Lebanon Springs Railroad Company before said consolidation of a mortgage of said Vermont and New York railroad to the orator as trustees to secure the payment of the bonds of

said Lebanon Springs Railroad Company and the interest 81
thereon ; the non-payment of said interest when due, and the forfeiture thereby of the condition of the said mortgage, and upon due appearance of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company by their respective solicitors, said bill having been taken as confessed, and the cause having been referred to a Master to ascertain the amount due under said mortgage, by whose report on file it appears that there is due of unpaid interest under said mortgage the sum of four hundred and ninety thousand dollars, all of which 82
by the files, records and entries in this cause in this court remaining, and which are hereby referred to as a basis of this decree, will more fully and at large appear.

It is ordered, ajudged and decreed by the court at this term that the said Lebanon Spring Railroad Company and said Harlem Extension Railroad pay to the orators as trustees the said sum of four hundred and ninety thousand dollars, with interest hereafter to accrue, and the costs of this suit taxed at the su n of thirty-one dollars and thirty-five cents, before the 20th day of January, 83
1873.

And in default of such payment that all the said mortgaged property, namely, the said railroad formerly known as the Vermont and New York Railroad, its rights, privileges and appurtenances, and all the franchises to possess, own and maintain and operate the same, and all the right, title, estate and interest of said Lebanon Springs Railroad Company and said Harlem Extension Railroad Company therein, shall be sold at auction to the highest bidder, for cash, on the 20th day of January, 84
1873, at two o'clock in the afternoon, at the Court House in Bennington, in the County of Bennington, to satisfy this decree.

And DAVID MCEOWEN, Esq., of Bennington, is hereby appointed a Special Master in Chancery to conduct and make said sale.

And he is hereby directed to give notice of said sale by advertising the same, and the substance of this decree,

85 once a week for five weeks next preceding said sale in the *Bennington Banner*, newspaper published at Bennington aforesaid ; in the Manchester, in said County of Bennington ; in the *Rutland Herald*, a newspaper, published at Rutland, in the County of Rutland ; and in the *New York Daily Times*, published in the City of New York.

And to hold said sale at the [illegible] place appointed, in conformity with the direction of this decree and the terms of said advertisement, and to sell said mortgaged property and franchises to the highest bidder, for cash at fair
86 public vendue, and to execute a suitable and sufficient conveyance thereof, to the purchaser, which shall recite the substance of this decree, and the proceedings under it, and shall be executed in the manner required by law of this State.

And said Master shall make due and full return of his proceedings to this court, and shall pay into Court the proceeds of said sale to be held for the benefit of the bondholders under said mortgage who shall come in and
87 prove their claims under the direction of the Court.

And if said proceeds shall be more than suffieient to pay the just claims of said bondholders as proved, then the residue thereof to abide the order of the Court upon application of parties in interest.

And said Master shall be allowed from said fund such costs, expenses and fees of said advertisement, sale and conveyance as may be allowed by the Court upon his application.

88 And the orators shall be allowed from said fund their just charges and expenses.

Done in Court in said Bennington this 6th day of December, 1872.

HOYT H. WHEELER,
Chancellor.

E. J. PHELPS,
Solicitor for Orator.

This decree is certified to be in due form and correct. 89

E. J. PHELPS,
Solicitor.

Filed in Court, December 7th, 1872.

JOHN V. HALL,
Clerk."

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And that said decree in the second of said actions was in the words and figures following : 90

## "Decree.

STATE OF VERMONT, }
Bennington County. }

THE UNION TRUST COMPANY OF NEW YORK
vs.
THE HARLEM EXTENSION RAILROAD COMPANY.
} In Equity. 91

## Decree.

And now upon the orator's bill in this cause on file, setting forth the formation of the said Harlem Extension Railroad Company, by consolidation of the Bennington and Rutland Railroad Company Vermont and the Lebanon Springs Railroad Company of New York, by agreement and proceedings therein referred to and stated. 92 And further setting forth the due execution by said Harlem and Extension Railroad Company to the orators as trustees of a mortgage of the consolidated railroads, franchises and property belonging to said Harlem Extension Railroad Company, to secure the bonds or notes of said company and the interest thereon. The issue and sale of said bonds and the non-payment of the interest

93 thereon when due, and that the principal of said bonds had thereby become due.

And praying for a foreclosure of said mortgage, and a sale of said mortgaged property and franchises so far as the same are in the State of Vermont. And upon his appearance for said Harlem Extension Railway Company by their solicitor, said bill having been taken as confessed, and the same having been referred to a Master to ascertain the amount due, whose report has been filed, all of which by the filed records and entries in the cause
94 now in Court remaining, and which are hereby referred to as the basis of this decree, will more fully and at large appear,

It is ordered, adjudged and decreed by the Court, at this term, that the said Harlem Extension Railroad Company pay to the orators, as trustees, under said mortgage, the sum of one million six hundred and fifty-seven thousand five hundred dollars, being the amount so shown by said Master's Report to be due under said mortgage, together with the interest to accure thereon,
95 and the costs of this suit, before the 20th day of January, 1873. Said costs being taxed at the sum of thirty-one dollars and thirty-five cents.

And that, in default of such payment, all the railroads, property and franchises covered by said mortgages so far as the same lien or exist within the State of Vermont, being the said Bennington and Rutland Railroad, and said Vermont and New York Railroad, with all their and each of their lands, privileges, appurtances, rights, premi-
96 ses and property of every description in the State of Vermont, and all the right, title, interest and estate of said Harlem Extension Railroad Company therein, and all the franchises of said company to be a corporation, and to have, own, maintain and operate said railroads, so far as derived under the laws of Vermont, be sold at public auction for cash, to the highest bidder, on the 20th day of January, 1873, at ten o'clock in the forenoon, at the Court House at said Bennington.

And Daniel McEowen, Esq., of Bennington, is here-

by appointed a Special Master in Chancery to conduct said sale. 97

And he is hereby directed to give notice of said sale by advertising the same, and the substance of this decree, weekly once a week for five weeks next preceding said sale in the *Bennington Banner*, newspaper published at Bennington ; in the *Manchester Journal*, newspape published at Manchester, in said County of Bennington ; in the *Rutland Herald*, a newspaper, published at Rutland, in the County of Rutland ; and in the *New York Daily Times*, newspaper published in the City of New York. 98 And to hold said sale at the time and place appointed, in conformity with the direction of this decree and the terms of said advertisement, and to sell said mortgaged property and franchises to the highest bidder, for cash at fair public vendue, and to execute a suitable and sufficient conveyance thereof, to the purchaser, which shall recite the substance of this decree, and the proceedings under it, and shall be executed in the manner required by laws of this State.

99

And said Master shall make due and full return of his proceedings to this Court, and shall pay into Court the proceeds of said sale to be held for the benefit of the bondholders under said mortgage who shall come in and prove their claims under the direction of the Court.

And if said proceeds should be more than suffieient to pay the just claims of said bondholders as proved, then the residue thereof to abide the order of the Court upon that application of parties in interest.

100

And said Master shall be allowed from said fund such costs, expenses and fees of said advertisement, sale and conveyance as the Court on his application shall direct.

Said sale to be subject to the rights of the orators, the said Union Trust Company, as trustee, under a certain mortgage of the Bennington and Rutland Railroad, made by the Bennington and Rutland Railroad Company on the 15th day of August, 1867, to secure the sum of five

101 hundred thousand dollars in the bonds of said company.

Done in Court at Bennington this 6th day of December, 1872.

HOYT H. WHEELER,
Chancellor.

E. J. PHELPS,
Solicitor for Orators.

This decree is certified to be in due form and correct.

E. J. PHELPS,
102 Solicitor.

And under and in pursuant of such decrees the said road, property, powers and franchises within the State of Vermont, were, by Daniel McEowen, a Special Master in Chancery, appointed by the said Court for that purpose, on the 20th day of January, 1873, sold to Charles G. Lincon, of Bennington, Vermont, for the sum of fifty thousand dollars, and that the said Special Master executed and delivered to the said Charles G. Lincoln deeds of
103 said road, property, powers and franchises bearing date the said 20th day of January, 1873, and said deeds were duly recorded in the office of the Clerk of the County of Bennington, Vermont, on the 22nd January, 1873.

That no part of either of said sums of one hundred thousand dollars and fifty thousand dollars has ever been paid; and that the Union Trust Company has never done anything to enforce such payment, nor anything under either mortgage since. On the 28th January, 1873,
104 the said defendants Hull and Lincoln, without any consideration, executed and delivered to the defendant Duncan and one Trenor W. Park a bond condition for the payment of five milions of dollars on or before the first of August, 1873, with interest at seven per centum per annum, and also they and the defendant Malissa A. Hull executed and delivered to said Duncan and Park a mortgage to secure the payment of the same, conveying all the roads, property, powers and franchises of the Harlem Extension Railroad Company,

including those of the Lebanon Springs Railroad Company and the New York and Vermont Railroad Company in both States, as hereinbefore set forth. Said mortgage was recorded in the offices of the Clerks of Rensselaer and Columbia Counties on the the 14th February, 1873, and in the Clerk's office of Bennington County, Vermont, on the first May, 1873, 105

The said Duncan and Park both then knew that the consideration for the deeds upon said sales in said actions remained unpaid.

That on the 30th of January, 1873, the defendants, James C. Hull and Malissa A. Hull, his wife, by their deed executed and delivered on that day, without any consideration, conveyed all said roads, property and franchises situated in the State of New York to the defendant, the New York, Boston and Montreal Railroad Company, subject, however, to said mortgage to said Duncan and Park; which deed was then duly recorded in Rensselaer and Columbia Counties ; that at the same time the defendant, Lincoln, by a deed executed and delivered by him, likewise for no consideration, conveyed said roads, property and franchises situated in the State of Vermont to the New York, Boston and Monteral Railroad Company, subject, however, to said mortgage to Duncan and Park and said five hundred thousand dollars mortgage on the old Bennington and Rutland Railroad, which deed was then duly recorded in Bennington County, Vermont. 106 107

That the said five million dollar mortgage made to Duncan and Park represented substantially the aggregate indebtedness, being the aforesaid bonds of the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, which the defendant, the New York, Boston and Montreal Railroad Company was to assume and pay according to the terms of the consolidation agreement by which it was formed, and the above mentioned other agreements and arrangements under which the property of said Harlem Extension Railroad Company was to be acquired by said New York, Boston and Montreal Railway Company, as before stated, and was 108

made in order to secure and maintain a lien upon the said premises, for the payment of such indebtedness, and that in accordance with such arrangement an agreement was made on or about February 11th, 1873, between the defendant, the New York, Boston and Montreal Railway Company, and the said Duncan and Park, expressing the amount and the mode of payment to be made by the said New York, Boston and Montreal Railway Company to the defendant Duncan, who was to have the custody of said moneys, and to disburse the same, to secure the payment and discharge of the aforesaid five million dollar mortgage, and that in pursuance of said agreement and other agreements and arrangements relating to the same matter, the said bond and mortgage, together with a satisfaction thereof, in writing, were placed in the custody of Jesse Seligman and John Crosby Brown, two of the trustees in said agreements mentioned, who were in accordance with the provisions of the said agreements, and arrangements and were authorized by power of attorney to receive and to endorse upon said bond the payments that should be made thereon, and upon full payment thereof, if within the time stipulated, to file said satisfaction piece and thus discharge said mortgage of record, but in case of a failure by said company to pay the full amount due on or before the first day of August, 1873, to re-deliver such bond and mortgage with the satisfaction piece to the mortgages. But in and by said agreements and arrangements it was further provided that if the said company should fail to pay for the reasons therein mentioned the amount due upon said bond and mortgage on or before August 1st, 1873, that then upon certain conditions the payment of such sum should be extended for eighteen months from said first day of August, 1873.

That the last-named company paid the sum of $807,077.05 on account of the moneys due on said bond and mortgage, which long since and on or before February 1, 1875, became wholly due and payable; but wholly failed to pay on or before said last mentioned day, or at any other time, the remainder, being much the larger part of

the sum due upon said bond and mortgage, and has never 113
paid the same, nor any part of the same, and has never completed its raslroad, and has become insolvent and abandoned its undertaking, and is wholly unable to pay the same or any part thereof. The defendant, Daniel Butterfield, was appointed by the Supreme Court of the State of New York Receiver of all its property and effects, on or about the 15th day or April, 1875, and that he has never taken any action whatever towards completing said railroad, or carrying on its enterprise or fulfilling its obligations, but has wholly failed to do so. 114

That during the year 1875 the New York, Boston and Montreal Railway Company executed and delivered a certain mortgage to secure bonds to the aggregate amount twelve million two hundred and fifty thousand dollars to the defendants, Seligman, Sherman and Brown. Said martgage was recorded 15th March, 1873, in Rensselaer County, in Book 138 of Mortgages at page 1, and covered the above mentioned railroad and other things. On the first day of April, 1875, said New York, Boston and Montreal Railway Company executed and delivered 115
another certain mortgage to secure other bonds, to the aggregate amount of twelve millions seven hundred and fifty thousand dollars to the New York Loan and Indemnity Company. Said mortgage was recorded in Rensselaer County, 28th June, 1873, in Book 140 of mortgages at page 21, and conveyed the above named railroad and other things. The said New York Loan and Indemnity Company was a corporation created and then existing under the laws of New York on the 19th April, 1877, and by a judgment of this Court said New 116
York Loan and Indemnity Company was dissolved, and the defendants, William H. Foster. Alfred A. Marsh, John Q. Hoyt, John A. Greene, Henry Redfield, John A. Nichols, Charles H. Dewing, Timothy Cornwall, John H. Cheever, Henry A. Tweed and one Reuben W. Van Pelt, and one Andrew McKenney, who have since died, were its directors at the time of such dissolution.

That enough of the bonds of the said last two mort-

117 gages were sold in Europe to realize six millions of dollars, which was received and disbursed by the defendants, Seligman and Brown, under Exhibit 20.

That afterwards a bill was duly filed in the Court of Chancery of the State of Vermont, where a portion of the mortgaged premises are situated, for the foreclosure of said mortgage by Hull and Lincoln for $5,000,000 against the defendants, James C. Hull, Malissa A. Hull, his wife, Charles G. Lincoln, the New York, Boston and Montreal Railway Company and Daniel Butterfield, as
118 Receiver of the property and effects of the New York, Boston and Montreal Railway Company. Subpænas duly issued therein with the said bill were duly served upon said defendants and such proceedings were afterwards had therein that in the year 1883 a decretal order was entered therein foreclosing said mortgage and directing a sale of the whole of said mortgaged premises, and that that this plaintiff and other like bondholders are entitled to have said sale proceeded with for their benefit and on their behalf.

119 That the said railroad hereinafter described was operated by and on behalf of the New York, Boston & Montreal Railway Company until sometime in November, 1873, when said company leased the said railroad to the Central Vermont Railroad Company, by which it was operated until the 20th August, 1877, when it withdrew from the possession of and abandoned the same.

That in the meantime the said New York, Boston and Montreal Railway Company had failed to fulfill
120 its obligations and became insolvent and abandoned its enterprise as hereinbefore found, and said Lebanon Springs Railroad when surrendered and abandoned by its lessees, lay unoccupied and unoperated until sometime in September, 1877, when it was taken possession of by one Russell C. Root.

That the possession of said road was subsequently delivered by said Root to a coporation called the "Harlem Extension Railroad South Coal Transportation Company," a corporation which was organized under the gen-

eral manufacturing laws of New York by said Root, who 121
was its first president and continued to be its president until said road came into the possession of John W. Van Valkenburgh as Receiver as hereinbefore stated.

That on the twe'y-seventh November, 1877, said Root delivered possession of said property to said last-named company, which continued in possession of an operating the same until said road came into possession of John W. Van Valkenburgh, as hereinafter stated.

That on the seventh September, 1880, one Marvin Sackett, who claimed to be the owner of bonds, issued by 122
said Lebanon Springs Railroad Company, to the amount of $8,700, brought an action in this court against the said Russell C. Root and the said Harlem Extension Railroad South Coal Transportation Company, and also against the said New York, Boston and Montreal Railway Company, and against the said Daniel Butterfield as its Receiver,

In his complaint he alleged that he brought the action
"in behalf of himself and all others, bondholders of the 123
"Lebanon Springs Railroad Company, similiarly situ-
"ated, who hold any of the two millions of dollars of the
"bonds of the Lebanon Springs Railroad Company,
"hereinafter referred to, and who shall be entitled to
"avail themselves of the benefit of this suit."

He prayed for the sale of the whole of the said railroad property and franchises.

He alleges in his complaint the fact of the mortgage to secure his bonds among others to the Union Trust
Company of New York, its actions to foreclose, the sales 124
under them, and the non-payment of the purchase money.

He did not make the Union Trust Company of New York a party to the action.

He alleged in his complaint the aforesaid sales to Hull and Lincoln and their mortgage to Park and Duncan as aforesaid, and their conveyance to the New York, Boston and Montreal Railway Company as aforesaid. And that

125 Hull and Lincoln and Park and Duncan acted throughout all those matters as the "agents" and the "representative" and "for the use and benefit," and for the "sole benefit and advantage" of the Lebanon Springs bondholders; and that the mortgages was given to Duncan and Park "for" those bondholders, and that Park and Duncan held the property as "trustees" for those bondholders. He did not make either Park or Duncan or Hull or Lincoln parties to the action. He did not make any of the trustees under the two mortgages for
126 twenty-five millions of dollars parties to the action, nor the trustee of the aforesaid mortgage to the Harlem Extension Railroad Company.

The summons and complaint in that action were served upon the New York, Boston and Montreal Railway Company, 7th September, 1880, and upon Daniel Butterfield as such Receiver, 23rd September, 1880. They both made default and have never done anything.

The summons and complaint was served upon Russell C. Root and the Harlem Extension Railroad South Coal
127 Transportation Company, 7th September, 1880. They put in joint answers 25th September, 1880, which are in evidence.

The plaintiff did not bring the action to trial until the tenth of October, one thousand eight hundred and eighty-four.

He proceeded as follows:

On the first of October, 1880, he moved for the ap-
128 pointment of a Receiver, which motion being opposed by nobody, was granted, and John W. Van Valkenburgh was appointed.

This order was filed 7th October, 1880, and Van Valkenburgh's bond was filed 11th October, 1880, Root and the Harlem Extension Railroad South Coal Transportation Company abandoned the road. On the twenty-fifth October, 1880, Van Valkenburgh proceeded to borrow twenty-five thousand dollars without giving any notice to anybody. On twelfth November, 1880,

one Bloodgood and six others claiming to own a majority 129
of the Lebanon Springs bonds, and who did own more than three hundred thousand dollars of the same, noticed a motion to be made parties to the action. This motion was heard on the 27th November, 1880, and was opposed by the plaintiff and denied, The decision was made on the 28th December, 1880; an order was made and entered on the 10th day of January, 1881. The order denied the motion, and directed the plaintiff to serve copies of all papers and notices of every kind on one F. L. Westbrook, who, by the order was authorized and al- 130
lowed to appear as counsel in behalf of the said Bloodgood and the other six bondholders, who had joined in the petition "upon all trials, hearings and motions."

Said Westbrook finally declined to act, and so finally declined before the hearing upon the order for certificates of 2d April, 1881.

On or about the sixth November, 1880, said Park and Duncan made application to the Court to be made parties to the action. They alleged that they were the owners of over $300,000 of Lebanon Springs bonds and 131
over $600,000 of Harlem Extension bonds, and that they were the mortgagees under the mortgage made by Hull and Lincoln which the complaint alleged they held as trustees for the Lebanon Springs bondholders. The application for the granting of this petition was opposed by the ptaintiff, was heard on the 27th November and 10th December, 1880, and was not granted.

One Henry A. Tilden, who claimed to own thirty Lebanon Spring bonds, was associated with the said 132
Sackett in the bringing of the action. He retained the Hon. Hamilton Harris as counsel therein, and assumed to control the action.

The application of Bloodgood and the six others, was ended on the 10th January, 1881. On the 23rd February, 1881, the Receiver vertified a petition to the Court in form for instructions. But with a suggestion that he issue certificates to be made a first lien for among other things, the "settlement of unavoidable in debtedness of

133 the company now existing." He noticed this pertition for hearing for the 5th March, 1881.

On the 5th March, 1881, the plaintiff not appearing an order was made appointing one Jones, an expert, to examine the railroad. Said Jones made his report 19th March, 1881. On the 2nd April, 1881, the report of the said Jones was presented to the Court by the Receiver, when, after hearing two counsel for the Receiver and nobody else appearing, the Receiver was ordered to issue certificates of indebtedness to the amount of
134 $350,000, to bear interest at six per cent., and to be a first lien upon the property. The order also appointed one Strait Referee to "hear and determine *all existing* "*claims* against said Lebanon Springs Railroad Com- "pany." This order was filed 4th April, 1881.

The Receiver got his first money on the 10th May, 1881. On the 20th April, 1881, the plaintiff, Sackett, prepared a petition in which he says he was "obliged to "collect, classify and arrange all the complication of "facts and place them in the hands of his counsel for
135 "the purposes of preparation to bring the said action," and he asked for $796.80 for himself, and something for his counsel.

This was presented to the Court on the 28th April, 1881, with notice to the Receiver. And the Court ordered the Receiver to pay the plaintiff, Sackett, $796.80, and to pay the plaintiff's attorneys $1,200.

On the 18th May, 1881, one Andrews, who had been one of the Receiver's counsel upon the application for
136 the order for the certificates 2d April, 1881, presented a petition asking to pay for his services. This was presented to the Court on the 20th May, 1881, and the Court ordered the Receiver to pay to said Andrews $3,000. On the sixth of June, 1881, the Receiver presented a petition to the Court praying for his compensation, and the Court made an order allowing him five per cent. upon all sums received and disbursed.

On the 28th June, 1881, one Carpenter, appearing by the attorneys for the plaintiff, Sackett, presented a

claim to the Referee Strait, for $35875, for "services 137
"rendered at the special instance and request of the
"said Lebanon Springs Railroad Company." The
Referee gave him judgment for that sum.

On the 28th June, 1881, the plaintiff, Sackett, presented, another claim to the Referee Strait, for $2,222.34, and interest for services rendered "at the special instance "and request of the said The Lebanon Springs Railroad "Company." This claim the Referee, on the 30th of June, 1891, allowed at $3,000.04.

One, William F. Taylor, presented a claim against the 138
Lebanon Springs Railroad to the Referee, Strait, who allowed it at $2,500.

On the 29th June, 1881, the said Henry A. Tilden presented, through the attorneys for the plaintiff, Sackett, a claim for $25,267.37 against the former Lebanon Springs Railroad Company for moneys expended at its request, after the making of the $2,000,000 mortgage. This claim the Referee allowed on the 5th July, 1881, at the whole amount. 139

From this time forward none of the defendants ever appear or do anything in the action. And the plaintiff does nothing until the 23d September, 1884.

On the 23d September, 1884, plaintiff's attorney noticed the case for trial for the 10th of October, 1884.

On the tenth of October, 1884, a trial was had between the counsel for the plaintiff, counsel for the Central National Bank of Boston, and other holders of certificates, and the Hon. Hamilton Harris, who had been 140
retained by the said Henry A. Tilden for the plaintiff, and had also received from the said F. L. Westbrook authority to represent him.

As a result the Court found among other things that Hull and Lincoln held the title as trustees for the bondholders, although neither was a party to the action, and judgment was rendered directing the sale of all the railroad and property in New York, subject to the principal of the receiver's certificates, and directing the purchase

141 money to be applied in payment, first, of certain counsel fees and expenses of the receivership, and next, the interest due on the receiver's certificates, and directing any balance to be paid into Court.

This was entered 27th January, 1885. The Referee, after adjourning the sale three times, sold to the defendant Foster, as trustee for $155,000. This amount of $155,000, had been made up by the Receiver on the 2d June, 1885, and was composed of the following items: Counsel fees, $27,299.21; Interest on certificates, $64,-
142 156.66; Receiver's commissions, $15,851.56; Taxes, $2,290.55, and debts of the receivership the balance.

That said Trenor W. Park died intestate 13th December, 1882, and defendant McCullough was duly appointed administrator of the goods, chattels and credits which were of said Trenor W. Park, and filed his bond and accepted, and is acting.

That in 1886, the defendant, the Central National Bank of Boston, claiming to own such certificates to the amount of two hundred and fifty thousand dollars, stated
143 at par of the principal of the same, brought an action in this Court against the defendants, Foster, Hazard, the New York, Rutland and Montreal Railway Company, and the American Loan and Trust Company. That in that action the plaintiff prayed for the sale of the said railroad and property for the satisfaction of the certificates. That action was removed into the Circuit Court of the United States and such proceedings have been had therein that a decree has passed whereby it is provided that the said railroad and property be sold by a Master
144 of that Court for the payment of the said certificates. Under that decree the railroad and property are advertised for sale.

That the New York, Rutland and Montreal Railway Company is wholly insolvent and its credit entirely exhausted.

II.—The said action wherein said Marvin Sackett was plaintiff, was commenced at the request and with the concurrence of the following holders of the followings

bonds of the Lebonon Springs Railroad Company, 145
amounting to about twelve hundred thousand dollars at their face value stated at the par value of the principal of the same, and counsel retained and acting for the said bondholders to the amount of about $1,200,000, drew the original complaint in said action at the request and with the concurrence of said bondholders including said Marvin Sackett.

One Edward Crane was the owner of such bonds and was represented in the said Sackett suit, at its beginning; and during the pendency of the said action, wherein 146
Marvin Sackett was plainitff, was the owner of said bonds issued by the Lebanon Spring Railroad Company, amounting to $700,000 face value stated at par value of the principal of the same. Said Edward Crane, while holder of such bonds, was consulted in regard to said suit, and was represented, in the said Sackett suit, by the attorney and counsel who conducted the said suit in the name of said Sackett, down to the time of its termination.

The following other persons, owners of said Lebanon 147
Spring bonds, were also associated with said Sackett in said Sackett suit and were represented in the said suit by the attorney and cousel who conducted the said suit in the name of said Sackett down to the time of its termination.

Samuel J. Tilden who owned $150,000 of bonds face value; Aaron J. Vanderpool and George W. Quintard as the executors of the last will and testament of Oliver Charlick who owned $62,000 of bonds, face value; Henry 148
Blood, who owned $10,000 of bonds, face valne; one Delancy, who owned $25,000 of bonds, face value; Augustus Schell, who owned $75,000 of bonds, face value; Henry A. Tilden, who owned $30,00 of bonds, face value; the estate of Moses Y. Tilden, which owned less than $30,000 of bonds, face valve; the estate of Horace F. Clark, John W. Van Valkenburgh, who owned $42,200 of bonds, face value; John L. Melchor, who owned $30,000 of bonds, face value; William H. Brower,

149 who owned $10,000 of bonds, face valve ; L. G. Fisher, who owned $10,000 of bonds, face value ; Ira Thorn who owned $5,000 of bonds, face value ; J. Hendricks, who owned $10,000 of bonds, face value ; F. E. Blanchard, who owned $5,000 of bonds, face value, in possession of Hon. Hugh McLellan ; the town of Petersburgh in Rensselaer County, which owned $20,000 of bonds, face value.

III.—That the Receiver Van Valkenburgh received from the certificates two hundred and thirty-six thousand
150 five hundred dollars ($236,500) and no more.

IV.—That he paid as follows :

| | |
|---|---|
| Plaintiff Sackett..... | $769 80 |
| " " ..... | 3,000 04 |
| Carpenter..... | 358 75 |
| Taylor..... | 2,500 00 |
| Tilden..... | 23,967 36 |
| | $30,622 97 |
| 151 Counsel..... | $39,203 50 |
| Referee..... | 518 20 |
| Receiver..... | 22,422 91 |
| Interest on Certificates..... | 21,009 27 |
| | $115,807 04 |

V.—That the suit of Sackett against Root was neither brought nor conducted for the purpose of realizing the property to the owners of the said Lebanon Springs bond.

152

VI.—That it was brought and conducted for the purpose of realizing out of the property certain individual claims of the said Sackett and Tilden, in preference of and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property and were behind the mortgage.

VII. That there is now to wit : The tenth of November, 1891, due and unpaid upon the mortgage for five millions of dollars given by Hull and Lincoln to Park

and Duncan, the sum of $4,192,922.95, with interest from 153
first of January, 1875, and that there is now due upon the mortgage to Brown, Seligman and Sherman at the New York Loan and Indemnity Company the sum six millions of dollars with interest from January 1, 1875.

And the following

## Conclusions of Law.

1. That by reason of the non-payment of the purchase money under the judicial sales in 1873, Hull and Lin- 154
coln took but a naked title in trust for the Union Trust Company as trustees for both the Lebanon Springs bondholders and the Harlem Extension bondholders and by their mortgage to Park and Duncan conveyed but that naked title in trust.

2. That Duncan and McCullough, as administrator of Park, hold the bond and mortgage so made to them by Hull and Lincoln, impressed with the trust in behalf of the Union Trust Company as such trustee, to the extent of the whole amount due upon it as hereinbefore found. 155

3. That the plaintiffs and all the other owners of Lebanon Springs and Harlem Extension bonds and the Union Trust Company of New York as trustee, are entitled to have the aforesaid foreclosure judgment and decrees of 1872 now enforced, and the said mortgage of Hull and Lincoln to Park and Duncan now foreclosed; and all the property and franchises described in the complaint sold under and by virtue of the said judgment and decrees, and the power of sale in said mortgage, to realize 156
the said sum of $4,192,922.95 and interest, and that the persons entitled under the mortgage made to Brown, Seligman and Sherman, and the New York Loan and Improvement Company, are entitled to all the proceeds of the sale, beyond the said sum of $4,192,922.95 and interest up to the amount due upon these mortgages respectively, and to the balance, if any, the defendant Butterfield, as receiver, is entitled.

4. That the action brought in this Court by Marvin

157 Sackett was not a representative action, for the reason *first*, that it was not so in fact nor intended to be, and *second* because the Union Trust Company was not made a party; and inasmuch as upon the face of the records of this Court it professes to be the action of these plaintiffs, and all other owners of Lebanon Springs bonds and to sell and dispose of all their interest and that of the Union Trust Company in the property and franchises, the plaintiffs and all the other holders of such bonds and the Union Trust Company are now entitled to the judgment
158 and all the proceedings in that suit including the sale and the deed by the Referee to the defendants, Foster and Hazard reviewed and reversed, and all the property and franchises described in the complaint, together with all the interest therein of all the parties to this suit and of all Lebanon Springs and Harlem Extension bondholders sold for the purposes above stated.

That the holders of the certificates issued by the Receiver, Van Valkenburgh, are entitled to such proceeds of the sale as shall belong to those Lebanon Springs bonds,
159 which were, in the trial and judgment in the said suit of Marvin Sackett, represented by counsel actually retained by their owners.

6. That the plaintiffs have costs of this action and an additional allowance of two thousand dollars, this being a difficult and extraordinary case.

And I direct judgment as follows:

Perpetually enjoining in the usual form all suits, similar to this, by any Lebanon Springs or Harlem Ex-
160 tension bondholders or by the Union Trust Company, their agents, attorneys and servants.

Perpetually enjoining in the usual form, all suits to enforce any lien upon or to effect any of the property or franchises or any interest therein by any of the holders of certificates issued by the Receiver, Van Valkenburgh, their agents, attorneys and servants.

Adjudging that all the franchises and powers described in the complaint are in full life and vigor, and none of them lost or lapsed,

Adjudging in the usual form of a decree upon a bill of review, that the judgment and all proceedings in the suit brought by Marvin Sackett, including the sale thereunder and the Referee's deed, be now reviewed and reversed, and perpetually enjoining the sale in the suit by the Central National Bank of Boston. 191

Adjudging that the judgment and decrees of 1872 be now enforced.

Appointing a Referee to sell all the said property and franchises with the usual diretions upon foreclosure sales and to distribute the proceeds, and to execute the usual deed to the purchaser and adjudging that the defendants Duncan and McCullough as administrator execute a similar conveyance as to the said property, franchises and powers, and that the Referee report the fact and the facts of his own sale to the Court. 162

Barring and foreclosing in the usual form all parties to this suit and all Lebanon Springs and Harlem Extension bondholders.

Continuing the Receiver until the delivery of the Referee's deed and its confirmation by the Court and directing him then to deliver possession to the purchaser. 163

Appointing a Referee in the usual form to determine upon the evidence already taken and the findings, and the proofs upon which the order was made 25th April, 1891, upon motion of S. A. Rockfellow and others, and such other evidence as shall be presented, who are the owners of the said Lebanon Springs and Harlem Extension bonds and receiver's certificates, and which of said bonds were actually in Sackett's suit, together with the amount paid thereon; with special directions that the evidence already taken and the findings hereinbefore made shall not be conclusive as against any person not a party to this suit, upon the question as to whether his bonds were actually in Sackett't suit, with the nsual directions as to the giving of notice. 164

With the direction usual in a final decree, that any party may apply to the Court at the foot of the judgment.

165 And it appearing to the Court that due notice has been given to Schuyler A. Rockfellow, Esq., attorney for himself and for Erastus Corning, Frederick H. Lawrence, John L. Lawrence, George N. Lawrence, James W. Walsh, Henry E. Tremain and Mason W. Tyler of the appiication for this judgment at this time and place,

It is now, on motion of Campbell & Paige, attorneys for the plaintiffs, adjudged:

That the various computations of the amounts due and
166 proofs of the facts and circumstances taken as aforesaid be and are correct and true and confirmed.

That none of the powers and franchises hereinafter stated to have been conferred upon or enjoyed by eitner the Lebanon Springs Railroad Company or the Vermont and New York Railroad Company have expired, lapsed or been lost, but all are in full force and vigor.

That all owners of any of the bonds hereinbefore described, issued, either by the Lebanon Springs Railroad Company or the Harlem Extension Railroad Company
167 and each of them, and the Union Trust Company of New York, and their and each of their officers, agents, servants and attorneys are hereby perpetually enjoined and and restrained from bringing and from proceeding with any action similar to this, and any action under either of the aforesaid mortgages, made by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company whatever, and from suffering any such action to be brought or to be prosecuted or to be proceeded
163 with in the names of any of them.

That all owners of any of the certificates hereinbefore described as issued by the Receiver, Van Valkenburgh, and each of them, and their and each of their officers, agents, servants and attorneys are hereby perpetually enjoined and restrained from bringing and from proceeding with any action or proceeding in any court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers hereinafter described, or any interest therein, and from suffer-

ing any such action to be brought or to be prosecuted or 109
to be proceeded with in the names of any of them.

That the judgment in the action above-mentioned brought in this court by the defendant, Marvin Sackett, against Russel C. Root, the Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company, and Daniel Butterfield, its Receiver, entered in Rensselaer County, and dated January 12th, 1885, and all orders and proceedings in that action, and the sale by the Referee under such judgment, and the deed of the Referee under such 170
judgment, and pursuant to such sale, to the defendants Foster and Hazard, be and they hereby are reviewed and in all things reversed, vacated, set aside and held for nothing.

That the defendants, The Central National Bank of Boston. Peter Butler as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. 171
Loutrell, Louisa M. G. Wright, Francis A White, Mary Gilbert, Sarah Gilbert, William Foster, Jr., Rowland N. Hazard, The New York, Rutland and Montreal Railway Company and the American Loan and Trust Company, and all other owners of certificates issued by the said Van Valkenburgh as receiver as aforesaid, and each of them, and their, and each of their officers, agents, servants, and attorneys, are hereby perpetually enjoined and restrained from proceeding with the sale under the decree in the action brought by the defendant, the Central Na- 172
tional Bank of Boston, against the defendants, Hazard, Foster, the New York, Rutland, ~~Boston~~ and Montreal Railway Company, and the American Loan and Trust Company, a copy of which is attached to the answer of the Central National Bank in this action, and from suffering the said sales to proceed in ~~this or any of~~ their or any of their names or behalf.

That the judgment and decrees of 1872 be now enforced.

173 That all the premises, property, franchises and powers hereinafter described be sold together and not separately at public auction in the county of Rensselaer by or under the direction of John L. Henning, of Saratoga Springs, Counsellor at Law who is hereby appointed as Referee for that purpose; that the said referee give public notice of the time and place of such sale according to law and the practice of this court; that either or any of the parties to this action may purchase at such sale; that the referee execute to the purchaser or purchasers a deed of
174 the property, premises, franchises and powers sold; that out of the monies arising from such sale after deducting the amount of his fees and expenses upon such sale, and any lien or liens upon the same for taxes, he pay to the plaintiffs or their attorneys the sum of eighteen hundred and seventy-five dollars, hereby adjudged to the plaintiffs for their costs, together with the sum of two thousand dollars allowed to the plaintiffs by the Court for an additional allowance.

That there shall be paid in cash at the time of the
175 sale such amount as the referee may direct, and at the time of the delivery of the deed the balance of the purchase money.

That the referee after the payment of the amount of his fees and expenses and the taxes and costs as aforesaid, shall pay to the holders of the Lebanon Springs bonds the amount found to be due upon their respective bonds, as it shall be established by the report of such referee, confirmed by the Court, except that as to the portions coming to the owners of such bonds as were in the
175 Sackett suit, as the same shall be found by such report so confirmed, he shall pay so much thereof to the holders of the receiver's certificates as shall satisfy the same, as the same shall be found by the said report so confirmed, and the balance to the holders of such bonds.

And he shall pay the remainder of such purchase price, if any, into Court.

The aforesaid sale shall be made subject to a debt which the receives has been authorized to contract to the

amount of Twenty thousand dollars, and to no other lien or charge whatever. 177

That the Referee make a report of such sale and file it with the Court with all convenient speed; that if the proceeds of such sale be insufficient to pay the several amounts so reported due as aforesaid, the said Referee specify the amount of such deficiency in his report of sale, and that the defendant the New York, Boston and Montreal Railway Company, pay the same; and that the purchaser or purchasers be let into possession on production of such deed, and a certified order confirming the report of sale. 178

That the defendants, William Butler Duncan, and John G. McCullough as administrator of the goods, chattels and credits of Trenor W. Park, deceased, under the direction of said Referee, execute and deliver to the purchaser or purchasers a deed of all such property, premises, franchises and powers, and in conformity with the power of sale contained in the mortgage from Hull and Lincoln to Park and Duncan. and that the Referee specify the same in his report. 179

That the defendants and all persons claiming under them or any or either of them, after the filing of the aforesaid notice of the pendency of this action, be and are hereby barred and foreclosed of all right, title, interest and equity of redemption in the said premises, property. franchises and powers so sold, or any part thereof.

That the receiver be and is continued until the delivery of the referee's deed and its confirmation, and that he then deliver possession to the purchaser and account to the Court. 180

That the Referee ascertain and determine, and report from the evidence already taken upon this trial and the above tidings, and the proofs upon which the order was made, 25th April, 1891, upon motion of S. A. Rockfellow and others, and such other evidence as shall be furnished him, who, other than the plaintiffs, are the holders of the said bonds issued by the Lebanon Springs Railroad Company, and the Harlem Extension Railroad Com-

181 pany, and which of them were in the trial and judgment in the said suit brought by Marvin Sackett, represented by counsel, actually retained by said holders, and that upon such ascertainment, determination and report, the aforesaid evidence and proofs and findings shall not be conclusive as against any person who shall appear upon such reference and who is not now a party to this suit, upon the question as to whether his bonds were actually in the said suit brought by Marvin Sackett; that the said Referee also ascertain, determine and report from
182 the aforesaid evidence and findings and such other evidence as shall be furnished him, who are the holders of the said certificates issued by the Receiver Van Valkenburgh, and how much has been paid upon said certificates, and the said Referee is hereby authorized and directed to give notice by advertising in two daily newspapers published, one in the City of Troy called the *Troy Press*, and one in the city of New York called the *New York Tribune*, requiring the said holders of said bonds and said certificates, to produce the same before
183 the said referee at his office in Saratoga Springs or such other place and at such time as he shall designate (which shall be at least twenty days after the first publication of said notice), and make proof as to their title thereto, and the amount due thereon, and the said referee is also authorized and directed to report what would be the just proportion and amount for the said other holders of said bonds to contribute to the expenses of the suit.

The following is a description of the said premises, property, franchises and powers:

184 All the franchises and powers conferred upon the Lebanon Springs Railroad Company, by the following acts of the Legislature of the State of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An Act to authorize the Lebanon Springs Railroad "Company to construct an extension of its road into "Massachusetts and Vermont, and to provide means "therefor," passed March 8th, 1853, and being Chapter 25 of the Laws of that year;

"An Act to amend an Act entitled "An Act to 185
"to authorize the Lebanon Springs Railroad Company
"to construct an extension of its road into Massachusetts
"and Vermont, and to provide means therefor," passed
"March 8th, 1853," passed June 24th, 1853, and being
Chapter 461 of the Laws of that year;

"An Act to enable certain connecting railroad com-
"panies to aid in the construction of the Lebanon
"Springs Railroad," passed April 12th, 1885, and being
Chapter 350 of the Laws of that year;

"An Act to extend the time for the completion of the 186
"Lebanon Springs Railroad," passed March 23d, 1857,
and being Chapter 150 of the Laws of that year;

"An Act to extend the time for the completion of
"the Lebanon Springs Railroad," passed April 12th,
1860, hnd being Chapter 285 of the Laws of that year;

"An act to extend the time for the completion of the
"Lebanon Springs Railroad," passed April 22, 1862, and
being Chapter 444 of the laws of that year;

"An Act to amend the charter of the Lebanon Springs 187
"Railroad Company," passed April 9th, 1864, and being
Chapter 145 of the Laws of that year;

"An Act to authorize any town in the Counties of
"Columbia and Rensselaer to aid in the completion of
"the Lebanon Springs Railroad," passed April 4th,
"1866, and being Chapter 373 of the laws of that year;

"An Act to extend the time for the completion of
"the Lebanon Springs Railroad," passed 26th February,
1867, and being Chapter 46 of the laws of that year; 188

And all the powers and franchises of railroad corporations stated in "An Act to authorize the formation of railroad companies, and to regulate the same," passed by the Legislature of New York, April 2d, 1850, and the several acts amendatory thereof and supplementary thereto, and the power to purchase, construct and operate the railroad hereinafter described, extending from Chatham Four Corners, in the County of Columbia, northerly through

the Counties of Columbia and Rensselaer to the borders of the State of Vermont, and into that State to the village of Bennington, and also the certain other special and particular powers and franchises stated in the above Acts, and also the following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the managing of the business thereof, which it might be done if that part were within the State of New York.

To create preferred stock at such a rate of dividend, or interest, and with such securities therefor, as may be deem expedient.

To extend the road by construction or purchase into the States of Vermont and Massachusetts as far as is or may be permitted by the authority of said States.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company—was authorized to construct or acquire on such terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and—

To consolidate either alone, or after consolidation with any company into a single corporation, with any company having a railroad or the right to construct a railroad which, or a portion of which, should be within the State of New York, and which should connect with the railroad of the Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in an Act entitled "An Act to authorize the consolidation of certain railroad companies," passed by the Legislature of New York, April 2d, 1853.

To exercise all the powers with respect to the railroads or portions of railroads which it might be constructed or acquire within the States of Vermont and Massachusetts as may be exercise if the same were wholly within the State of New York.

To have corporate stock and bonds taken and owned or 193
guaranteed by any company having or being authorized to construct a railroad connecting with the lines of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad.

To change the northern terminus of its railroad from the Massachusetts State line as declared in its articles of 194
association of the Lebanon Springs Railroad Company to any point within the town of Hoosick, in the County of Rensselaer, or the town of White Creek, in the County of Washington.

To construct a branch to a terminus at the Vermont State line at a point of junction with the Western Vermont Railroad, now known as the Bennington and Rutland Railway.

To construct a branch with a terminus in either or 195
both of the cities of Albany and Troy, with the same effects as if the line had been originally fixed in the articles of association both as to the main line and branches as the same are last above described, and the termini thereof had been its original terminus.

Also all powers and franchises conferred by the following acts which were duly passed by the Legislature of the State of Vermont, to wit:

"An Act to incorporate the Vermont and New York 196
"Railroad Company," approved November 2, 1865, and being No. 134 of the laws of that year:

"An Act to amend an Act entitled 'An Act to incor-
"'porate the Vermont and New York Railroad,' approved November 2d, 1856," approved November 19th, and being No. 167 of the laws of that year:

"An Act authorizing the Bennington and Rutland
"Railroad Company to consolidate their road with the

"road of the Lebanon Springs Railroad Company," approved November 21st, 1867, and being No. 155 of the laws of that year;

"An Act to enable the Bennington and Rutland "Railroad Company to aid in obtaining necessary rail-"road connections," approved March 28th, 1867, and being No. 2 of the Special Sessions of that year;

And the powers and franchises of railroad corporations under the laws of Vermont, and the powers and franchise to build, own and operate a railroad from Bennington to the Vermont State line, being that portion of the railroad hereinafter described, which is in the State of Vermont, and to transfer and convey such powers and franchises and any property and to consolidate with railroad companies.

And also the following described property, to wit:

All and singular the tracks or roadway of the Lebanon Springs Railroad, from Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in the town of Hoosick, in the County of Rensselaer, and all the lands acquired and hereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said the Lebanon Springs Railroad Company already built and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same, and of all of the above mentioned powers and franchises; and also all the rolling-stock, locomotives: tenders, snow-ploughs, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York Railroad, constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid, to the vil-

lage of Bennington, in the State of Vermont, including all the equipment and all the above mentioned powers and franchises of the said Vermont and New York Railroad Company belonging to or in any wise appertaining to, or which may at any time belong to or appertain, to have belonged to or appertained to the same or either of said railroads or companies, as well in law as in equity; including also all property of every kind, name or nature of, or purchased by or now or heretofore in the possession of the Lebanon Springs Railroad Company, the Vermont and New York Railroad Company, and John W. Van Valkenburgh as receiver, and William V. Reynolds, as receiver, and including also all property, powers and franchises of every name or nature described or mentioned in or subject to the lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867.

That all of the powers and franchises hereinbefore enumerated, stated or referred to are now possessed and enjoyed by the defendant, the New York, Boston and Montreal Railway Company, and are hereby ordered to be sold as aforesaid.

That any of the parties to this action and also the referee hereinbefore appointed, and the receiver, may hereafter apply to the court for such further order or directions as may be proper at the foot of this judgment, and the said receiver is hereby for such purpose made a party to this action without prejudice to any proceedings heretofore taken in the action.

Enter in Rensselaer County.

JOHN R. PUTNAM,
J. S. C.

D. E. CONWAY,
Clerk.

205 STATE OF NEW YORK,
City of Troy,
County of Rensselaer,
Clerk's Office.

I hereby certify, that I have compared the annexed copy of judgment with the original thereof filed in this office on the 11th day of Nov., 1891, and that the same is a correct transcript therefrom and of the whole of said original.

In witness whereof, I have hereunto set my
(SEAL) hand and affixed my official seal this
206 11th day of Nov., 1891.

D. E. CONWAY,
Clerk.

(*From the Record, folio 3022 of printed book.*) 207

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| STEVENS and others<br>*against*<br>UNION TRUST COMPANY and others. | Opinion. |

PUTNAM, *J.*: A careful examination of the opinion of the General Term (57 Hun, 499-515) leads to the conclusion that that Court has disposed of this case, 207a leaving nothing for me to do but direct judgment in pursuance of such opinion. Whatever my views might be I must, of course, be guided by the decision of the Appellate Court.

The case being important I thought of writing an opinion stating my views, but the opinion delivered at General Term covers the whole case and renders one by me unnecessary and improper.

Whatever the action may be called—whether a "Bill of review" or otherwise—the General Term has held it properly brought, and that the action is not barred by any laches of the plaintiff or any 207b statute of limitations (57 Hun, 515). The Court states (page 509): "A bill of review impeaching the "action and judgment for fraud brings the fraudu- "lent practices of the plaintiff or suffered by him "in the action, whereby he wronged those he "assumed to protect. Such is this action. It is a "direct attack, not upon any alleged error of the "Court, but upon the fraud of the plaintiff."

The Appellate Court has also held that the "Sackett" action was not a representative one. The opinion of the General Term was delivered on the reversal of the judgment of the Special Term of the law and facts.

208 The Court remarked in reference to the finding of the Special Term: "The conviction is forced upon "our minds that the finding cannot be sustained "and that the findings requested by the plaintiff, "namely, 'That said suit of Sackett against Root "was neither brought nor conducted for the purpose "of realizing the property to the owners of the "Lebanon Springs bonds,' ought to have been "made.

"Assuming that Sackett, and Tilden, his asso- "ciate, in bringing and conducting the action con- "templated the natural and probable consequence
209 "of their management of the action of Sackett *vs.* "Root, they cannot be acquitted of deliberate "spoliation of the Lebanon Springs bondholders.

"What has already been said suggests the delicate "and highly responsible trust which a representa- "tive plaintiff assumes in bringing such an action "as Sackett brought. He impliedly guaranties that "he will not allow his private interest to conflict "with his discharge of duty. Here we find Sackett "and Tilden obtaining from the fund, which it was "their duty to protect for the bondholders, $27,- "764.21 upon their private claims, which, if valid, "were behind the bonds. No suggestion of these
210 "claims was made in the complaint. Presumably "the other bondholders, if they had not been kept "out of the court by the plaintiff's intrusion as "their self-elected representative, would have "opposed their priority." * * * "Not content "to leave out of the action those who would have "naturally opposed these claims, they successfully "opposed and kept out such of them as tried to "come in. Under a pretense of protecting the "common and general interest of the bondholders, "Sackett and Tilden sacrificed them to their own "interests. This was a fraud, and of itself is "sufficient to establish the non-representative char-

" acter of the action and its misrepresentative char- 211
" acter. Sackett's omission to make the Union
" Trust Company, Park and Duncan and the trus-
" tees of the New York, Boston and Montreal Rail-
" way Company parties to the action is significant.
" When a party brings an action for himself he can
" select his own defendants, but when he volun-
" teers to sue as the representative of others, he
" should sue those who ought to be sued.

" If the railroad was to be sold, the common
" interest of the bondholders required that all out-
" standing liens and clouds upon the title behind
" the bonds should be cut off, to the end that there 212
" should be no diminuties of price upon account
" thereof." * * * * * * *

" It would seem to follow that the action by one
" *cestui que trust*, as the representative of all, is
" not proper where the trustee is alive and is not
" brought into court. He who seeks to procure
" the representation of all the bondholders should
" perform the condition precedent to such repre-
" sentation, namely, bring in as a party to the
" proper action their legal representative, their
" trustee. Where the trustee is dead the *cestui*
" *que trust*, through one or more as their repre-
" sentatives, can bring an action, since no trust shall 213
" fail for want of a trustee. (Galveston R. R. Co.
" *vs.* Cowdrey; 11 Wall., 459.) It is plain that
" if the Union Trust Company is not cut off, and
" these plaintiffs are not cut off by the Sackett suit,
" then no bar exists to the present action. * * *
" Unless the plaintiffs can be held to have con-
" sented to the Sackett suit, then whatever rights
" they could work out for themselves under the
" Union Trust Company's judgments, or the Park
" and Duncan mortgage, can be worked out in this
" action, since neither they nor the Union Trust
" Company nor Park and Duncan were parties to

214 " the Sackett action, and all necessary parties were
" made defendants in this action." * * * *
" Such an action, thus instituted, controlled and
" resulting, cannot be upheld. It was not a repre-
" sentative suit in fact; if it was such in form and
" regularity, then it is effectually impeached for
" fraud." * * * * * * *

The Court further says as to the receiver's certificates issued in the Sackett action: " As said in " Union Trust Company *vs.* Illinois Midland Com-
" pany (117 U. S., 460), ' These who take receiver's
" ' certificates must be deemed to have taken them
" ' subject to the rights of parties who have prior
215 " ' liens upon the property, and who have not, but
" ' should have been, brought before the Court.
" ' While the Court, under some circumstances, and
" ' for some purposes, and in advance of the proper
" ' lien-holders being made parties, may have juris-
" ' diction to charge the property with the amount of
" ' the receiver's certificates issued by its authority,
" ' it cannot, without giving such parties their day
" ' in court, deprive them of their priority of lien.
" ' When such prior lien-holders are brought before
" ' the court they become entitled, upon the plain-
" ' est principles of justice and equity, to contest
216 " ' the necessity, validity, effect and amount of all
" ' such certificates, as fully as if such questions
" ' were then the first time presented for determi-
" ' nation.' "

The new evidence given on the trial before me is not important. The material facts upon which the General Term based its decision remains unchanged, as will be seen by these parts of the opinion which I have quoted above.

Therefore nothings remains for me but to direct judgment in pursuance of the holding of the General Term. On the state of facts appearing on the first trial and which also appeared upon the trial,

before me, the Appellate Court determined that the 217
Sackett suit was not a representative one and that the plaintiffs in this action were not bound by the judgment rendered in that suit and were entitled substantially to the relief asked for in their complaint. It is therefore my duty to direct a judgment in pursuance of such holding of the Appellate Court.

It follows that there should be a sale of the property described in the complaint. The proceeds of the sale, after paying the costs of the action, should be brought into court. There should be a reference ordered to determine what bondholders 218
assented to or acquiesced in the Sackett suit, and also as to what bondholders held aloof from the Sackett action and are not bound by the judgment and proceedings therein. The latter are entitled to receive their *pro rata* part of the proceeds of the sale to be made in pursuance of the judgment in this action, the same as if the Sackett suit had never been brought. The share of the proceeds of the sale which would otherwise have been received by the bondholders who acquiesced in the Sackett suit or took part therein, should be paid to those holding certificates issued in the Sackett suit to the extent of said certificates issued. The 219
residue, if any, being payable to Hazard and Foster or their grantees, or rather as this Court may hereafter decree.

Upon a motion to strike the ~~opinion~~ injunction from the judgment, the trial Judge delivered the following opinion:

220 SUPREME COURT.

AARON R. STEVENS and others

*against*

THE UNION TRUST COMPANY, The Central National Bank of Boston and others.

Opinion.

PUTNAM, *J.*:

221 The facts on the second trial being substantially the same as on the first, in directing judgment herein, I based my conclusion on the holding of the General Term, feeling bound to follow that Court. If the question in the case had not already been passed upon by the appellate tribunal, I might have reached a different conclusion. But, of course, the opinion of the General Term on the same state of facts concluded me.

The effect of my decision therefore was to carry out the judgment of the General Term, and, hence, to determine, in reference to the "Sackett" suit that "such an action, thus instituted, controlled and
222 "resulting cannot be upheld. It was not a repre-"sentative suit in fact; if it was such in form and "regularity then it is effectually impeached for "fraud. The plaintiffs are * * * en-"titled to relief substantially the same as if the "Sackett action had never existed. They were in "no sense parties to that action, and, therefore, "their rights remain untouched. It is said they "are bound by the receiver's certificates which were "declared to be a first lien upon the property. "This cannot be so without a violation of constitu-"tional protection. The Court acquires jurisdiction "of the parties, and of the subject matter before it,

" but, from the nature of the case, can only acquire 223
" jurisdiction of so much of the subject matter as
" all the parties before it hold. * * *
" * * * * * Those who take receiv-
" er's certificates must be deemed to have taken
" them subject to the rights of parties who have
" prior liens upon the property and who have not,
" but should have been, brought before the Court.
" * * * * * The Central National
" Bank of Boston, a large holder of these certifi-
" cates, as plaintiff for itself and all other certificate
" holders, brought an action against Hazard & Fos-
" ter, the purchasers of the railroad, upon the sale 224
" of the Sackett suit and against the New York,
" Rutland and Montreal Railway Company, to
" which company Hazard and Foster conveyed the
" road, and against the American Loan and Trust
" Company, trustees of mortgage bonds issued by
" said railroad company. Judgment was obtained
" against said defendants, establishing the bank's
" ownership of its certificates and their lien upon
" the railway, and providing for the sale of the
" railway to pay the plaintiff and such others as
" should come in and establish their ownership.
" Such a judgment is good against the defendants
" in that action. They derive title to the railroad 225
" under the Sackett sale which preferred the cer-
" tificates. It is not binding upon the plaintiffs."

In pursuance of the decision of the Appellate Court I therefore found that the plaintiffs were entitled to a judgment providing that the Sackett judgment and all the proceedings in that action, including the sale and the deed by the referee to the defendants, Hazard and Foster, be reviewed and reversed, and all the property and franchises described in the complaint, *together with all the interest therein of all the parties to this suit and all the Lebanon Springs and Harlem Extension bondholders, be sold for the*

226 *purposes above stated.* Also holding that the holders of the certificates issued (in the Sackett suit) by the receiver, Van Valkenburgh, are entitled to such proceeds of the sale as shall belong to those Lebanon Springs bonds which were in the trial and judgment in the Sackett suit represented.

In this discussion we must assume that my conclusions and findings, based as they are on the authority of the Appellate Court as to the Sackett suit, are correct, and that the Sackett judgment and sale thereunder was properly set aside.

Having reached the conclusion then that the
227 Sackett suit was fraudulent and not a representative action and that the sale thereunder should be vacated and set aside and that the certificates issued in said action are, as to the plaintiffs, invalid and not enforceable, and that there must be a new sale of the property under the judgment in this action, it remains to be seen whether the defendant, the Central National Bank of Boston, should be allowed to proceed with the sale under the certificates issued in the Sackett suit under the judgment in the Circuit Court of the United States.

For what purpose? The sale under the judgment in that action could convey no title. It must
228 be subject to and over-reached by the sale directed by the judgment herein. Yet, being made subsequent to said last-named judgment the effect would necessarily be to cast a cloud upon the title and to embarrass the subsequent sale to be made in this action.

The judgment in the United States Court cannot be interfered with as far as it determines the rights of the Central National Bank to recover the proceeds of the bonds represented in the Sackett suit as against the defendants in the Federal action.

On the sale in this action the bank will receive the proceeds of the bonds represented in the

Sackett suit which would go otherwise to the bond- 229
holders. On the sale so to be made it is to be presumed that the property will bring as high a price, if not higher, as on the sale under the United States judgment; and hence defendants will in fact receive the same proceeds as under the sale in the Federal action. Why, then, should the property be sold in that action, such sale being necessarily overreached by the sale to be made herein and conveying no title?

What would be the effect of such a sale? The General Term holds that the certificates are void as to plaintiffs and all bondholders not represented in the Sackett suit. That the judgment in the Federal 230
action is not binding on such bondholders. That plaintiffs are entitled to relief the same as if the Sackett suit had never existed—that is, a judgment of foreclosure and sale under which a title to the road can be given. What, then, would be the effect of a sale under the Federal judgment in favor of the bank? As stated, such a sale would not give any title to the property. At the most it would convey to the purchasers the interest of the certificate holders who have acquired the interest of the bondholders represented in and assenting to the Sackett action, and who are also represented in the 231
Federal action. But what bondholders? As held by the General Term there must be an identification of those bondholders who held aloof from the Sackett suit, for such are not bound by any proceedings therein and are entitled to the benefit of this action. Therefore if there is a sale under the Federal judgment its only effect will be to transfer to the purchasers the interest of the certificate holders representing the bondholders who were represented in the Sackett action to the proceeds of the sale in this action. But such interest is already preserved and taken care of by the judgment herein.

232 Under the judgment entered in this action under the direction of the appellate Court there can be no sale under the Federal judgment, that is, a sale that will transfer any title to the purchasers.

For the above and various other reasons not necessary to be stated, I think that the clause in the judgment restraining the sale under the Federal judgment should be retained. If the bank has a claim against Hazard and Foster, the purchasers on the sale under the Sackett judgment, for any deficiency—after the judgment in this action setting aside the Sackett judgment and sale—I think they
233 may recover such deficiency as well if the property is sold pursuant to the judgment herein as if sold under the Federal judgment.

It is suggested, however, that the State Court cannot enjoin parties from proceeding in the United States Court in an action or under judgment therein.

There are statements in various authorities that would seem to sustain that position.

Thus, in 2d Story's Equity Jurisprudence, Sec. 900, the author says, referring to the power of the Chancery Court to restrain parties within its jurisdiction from proceeding in foreign courts in certain cases: "There is one exception to this doctrine
234 " which has long been recognized in America; and " that is, that State Courts cannot enjoin proceed- " ing in the Courts of the United States; nor the " latter in the former courts."

Chancellor Walworth, also in Mead *vs.* Merritt, 2d Paige, 402, says: " Although the Court has the " physical power to act coersively on a party " within its jurisdiction to the same extent, it has " frequently decided that it would not sustain an " injunction restraining a suit or proceeding pre- " viously commenced in a court of a sister State; or " in any of the Federal courts. The same principle

" has been adopted by the Supreme Court of the 235
" United States.

Diggs *vs.* Wolcott, 4 Cranch, 179.
McKim *vs.* Voorhees, 7 Cranch, 278.

" And I am not aware that any court of equity in
" the Union has deliberately decided that it will
" exercise the power, by process of injunction, or
" restraining proceedings which have been pre-
" viously commenced in the courts of another
" State."

To the same effect is the case of Rio Grande Rail-
road Company against Gomila, 132 U. S. Rep., 483, 256
the other case cited by defendant.

See Schuyler *vs.* Pellissier, 3 Edward's Chan., 191.
Coster *vs.* Griswold, 4 Edward's Chan., 376.

On the other hand, in Dinsmore against Nere-
sheimer, 32 Hun, 206, the General Term of the First
District enunciates this doctrine: "The principle
" has been regarded and stated as elementary in its
" character, that a court of equity should interfere
" when sufficient equitable reasons are presented
" for doing so, to restrain the prosecution of an un- 237
" conscionable action, although it may be pending
" in the courts of another State or country (Story's
" Eq. Jur., Sec. 899). This may be done without
" interfering with the proceedings themselves, by
" controlling the conduct of the parties when they
" are subject to the jurisdiction of the Court so
" interposing for the prevention of injustice." In
that action an injunction was granted to restrain
the prosecution of an action in the Supreme Court
of the District of Columbia, sufficient equitable
grounds existing therefor.

238 In Dehon *vs.* Foster, 4th Allen, 550, the Court remarked: "The authority of this Court, as a Court "of Chancery, upon a proper case being made, "to restrain persons within its jurisdiction from "prosecuting suits either in the courts of this "State, or of other States, or foreign countries, is "clear and indisputable. In the execution of "this power courts of equity proceed, not upon "any claim of right to interfere with or control "the course of proceedings in other tribunals, or "to prevent them from adjudicating on the rights "of parties when drawn in controversy, and duly
239 "presented for their determination. But the "jurisdiction is founded on the clear authority "vested in the courts of equity over persons within "the limits of their jurisdiction, and amenable to "process, to restrain them from doing acts which "will work an injury to others, and are, therefore, "contrary to equity and good conscience. As the "decree of the Court in such cases is pointed solely "at the party, and does not extend to the tribunal "where the suit or proceeding is pending, it is "wholly immaterial that the party is presenting "his action in the courts of a foreign state or "country."

240 This case was followed in Vail *vs.* Knapp (49 Barb., 308 and 309), Claflin & Co. *vs.* Hamlin (62 How., 284). In Town of Thompson *vs.* Norris (11 Abb. N. C., 171–172), Justice Learned intimates that there may be exceptional cases where an injunction would lie restraining the prosecution of an action in the United States Courts.

See also Burgess *vs.* Smith (2d Barb. Chan., 280), where Chancellor Walworth intimates that in a very special case the rule of comity forbidding the granting of an injunction to stay proceedings in a court of competent jurisdiction of a sister State might not be followed.

In Barry *vs.* Brune (8 Hun, 395, 71 N. Y., 261) 241
an action was commenced to collect an insurance policy and to restrain the enforcement of a judgment obtained by the defendant Brune in the Federal Court as assignee of the policy of insurance; plaintiff obtained a judgment for the amount of the policy and a perpetual injunction against the defendant restraining the enforcement of the United States judgment. This case would seem to determine that in a special case parties might be enjoined from proceeding in the Courts of the United States.

In People *vs.* The Erie Railway Co. (36 How., 132), the defendant was enjoined from delivering 242
its property to a receiver appointed by a United States District Court.

See also Bowers *vs.* Durant, 43 Hun, 348,
Garrison case, 1 How. N. S., 352;
Kettle case, 8 Daly, 72.
Hays *vs.* Ward, 4 John. Chan., 122.

If the judgment of the Central National Bank on the certificates had been in the Supreme Court of the State—being so obtained on certificates issued in an action held to be fraudulent and the judgment and proceedings in which are, so to speak, "wiped 243
out" by the judgment in this action, it would be hardly claimed that a sale on the foreclosure of said certificates, which could convey no title and which would necessarily cast a cloud upon the title of the property under the sale in this action, should be allowed to proceed.

There are cases which hold that where the jurisdiction of the United States is derived from the citizenship of the parties no higher sanctity or effect can be claimed for a judgment of a Circuit Court of the United States than is due to judgments of the

244 State Courts in a like case and under similar circumstances.

See Dupasseur *vs.* Rocherau, 21 Wall., U. S. Rep., 135.
Crescent Live Stock Co. *vs.* Butchers' Union, 120 U. S., 147.

If the doctrine as enunciated in these cases is correct, then the Court could as well enjoin the parties from proceeding to a sale on the judgment in the Federal Court in favor of the Central National Bank as if that judgment had been rendered in the Supreme Court of this State. Especially in a case
245 like this where the action was commenced in the Courts of this State and only removed to the Courts of the United States because of the citizenship of the parties.

With some hesitation I have reached the conclusion under the authority of the cases above cited that in some cases this Court as a court of equity by its judgment may restrain parties from proceeding in the Federal Courts, equity demanding such a judgment. It is true that ordinarily parties in an action in a State Court will not be enjoined from proceeding in the action in the Courts of the United
246 States. This is the usual rule. It may be said to be *the rule.* But there are exceptions to the rule as held in the authorities hereinabove cited.

In 1st High-on-Injunctions, page 92 (note to Sec. 111), the author, referring to the dicta 6th Wallace, 514, says: "While the doctrine as thus stated is "undoubtedly true as regards any effort on the part "of a State or Federal Court to operate by injunc- "tion upon the process of any other tribunal, State "or National, it should be borne in mind that courts "of equity, in the exercise of their extraordinary "powers by injunction, have never assumed to "enjoin the Court itself, but only to arrest the action

" of the parties litigant; and this in the exercise of 247
" a jurisdiction strictly *in personam.*"

Probably the State Courts cannot enjoin proceedings in a Federal Court, nor can a State Court ordinarily enjoin parties from proceeding in a Federal action, but there are exceptional cases where the parties may be so restrained. The cases cited by defendant I think are not quite similar to this. In Riggs *vs.* Johnson County (6 Wall. U. S., 166), an injunction was issued by a State Court to stay proceedings on a judgment duly rendered in a United States Court on the ground that the coupon bonds upon which the judgment was obtained were 248
void under the holding of the State Court, the Federal Court having held them valid. In fact by the action in which the injunction was issued the State attempted to reverse and set aside the holding of the United States Court on questions of law involved in the case. And the Court held: " That " the injunction of a State Court is inoperative to " control or in any manner affect the process or " proceedings of the Circuit Court."

It will be perceived that the action of the State Court in that case was in direct conflict with the United States Court. The cases of the United States *vs.* Keokuk (6 Wall., 514), The Mayor *vs.* Lord (9 249
Wall., 409), Supervisors *vs.* Durand (9 Wall., 415), are similar to that of Riggs *vs.* Johnson County (*supra*), and very clear not like this case. In Rio Grande R. R. Co. *vs.* Gomila (132 U. S., 478), the property of the debtor had been seized under execution on a judgment obtained of the Federal Court, and it was held that probate laws of the State would not *take the property from the hands of the Marshal.* The Court held that it would have been different had there not been any seizure under the United States judgment (pages 484–485). Of course such a decision follows the doctrine that the pro

250 ceedings in the Courts of the United States cannot be interferred with by the State Courts. The Court then through its officers being in the actual possession of the property. The case of Amy *vs.* The Supervisors (11 Wall., 136) is similar to that of Riggs *vs.* Johnson County (*supra*). In McKim *vs.* Voorhies (7 Cranch, 279), it is held that the State Court has no jurisdiction to *enjoin a judgment* in the Circuit Court of the United States. In that case the State Court attempted to enjoin all proceedings in a judgment of ejectment obtained in the Federal Court, thus restraining proceedings on the judgment, not the party.

251 I think that no injunction should be granted by State Courts restraining the enforcement by parties of a Federal judgment where the effect of such injunction is to raise a conflict with the Federal Court. Neither, probably, can proceedings in the Federal Courts be enjoined by a State Court. But authorities above cited seem to hold that in certain exceptional cases parties to an action in a State Court may be enjoined from taking any proceedings under a judgdment in a Federal Court.

Although the doctrine enunciated in some cases cited by defendant, if taken literally, seems differ-
252 ent, yet, such doctrine in each of such cases was stated in reference to the facts of the case before the Court, which, as we have seen, were very different from those in this case.

In this action the authority to issue the certificates, under which the Central National Bank is proceeding in the Federal Court, is an order made in the Supreme Court of this State in the Sackett suit. The same Court in which the Sackett order was entered now vacates and sets aside, as it lawfully may, the Sackett judgment and sale, and all proceedings in that action, except as far as it determines the rights of the Central National Bank and

Hazard and Foster and their grantees as against 253
parties represented in that action to the proceeds of the bonds held by parties so represented.

The Supreme Court, therefore, on setting aside the proceedings in the action under which the Central National Bank received its certificates may properly restrain by injunction that bank from proceeding upon the judgment it obtained upon such certificates.

That bank is striving to enforce certificates issued by the Supreme Court of this state, which that court now adjudges void. It is proper for that court to prevent the bank from selling under a judgment upon the void certificates, which sale would give no 254
title and tend to cast a cloud upon the title of the property to be derived under the sale herein. Such action of the state court is not at all in conflict with the holding of the Federal court. The judgment obtained in that court was in the action by the Central National Bank against Hazard and Foster, their grantees, and the American Loan and Trust Company, as subsequent mortgagees. Said judgment was based on the validity of the Sackett suit and judgment. The question as to whether that was a representative action or a fraudulent one was not involved. The only question in the Federal court 255
was, were the certificates issued pursuant to the order of the state court in the Sackett suit and was the plaintiff the owner of such certificates. No question raised in this action was involved in that. The judgment in this action raises no issue with the Federal court. That judgment was to enforce the certificates of this court, which this court now vacates with the proceedings and judgment in the action in which they were issued.

Hence this case is one where, in the language of the counsel for the defendant, "*something has arisen since the rendition of the Federal judgment to render its enforcement inequitable.*" It is true

256 that the judgment of the Federal court has not been reversed; but the certificates on which that decree was based are by the judgment entered in this action, and hence since the Federal judgment was obtained, with the proceedings in that action, "wiped out." Since the Federal judgment a judgment has been duly entered in the state court that avoids as against the plaintiff and parties to this action the certificates on which the Federal judgment was based and renders a sale thereunder inequitable and ineffectual to convey any title.

In fact, in my opinion, the effect of the judgment for the resale of the property and the vacating the
257 decree, and sale thereunder, in the Sackett suit renders an injunction of the sale under the certificates issued in the Sackett suit not only proper but necessary. If this court cannot award such an injunction it could not render the judgment given in this case. Such an injunction is a part of the relief the plaintiff is entitled to, if entitled to any judgment. To vacate the Sackett judgment and sale and proceedings on the ground that the action was not a representative one or was fraudulently conducted and yet to allow, under certificates issued in that action, defendant to sell the property would not be reasonable or proper.

258 I think, therefore, that the motion should not be granted. I presume that no order is necessary to be entered. The matters discussed on this motion might properly have been discussed before the rendition of judgment, and hence no costs should be allowed.

As to the $2,000 allowance to the plaintiff I thought, considering the amount involved and the necessary labor in the case that such allowance was not excessive. But, of course, if desired, the parties should be heard in the matter, and I am willing to hear any suggestion in that regard. Possibly other parties are entitled to some allowance.

(*From the Record, folio 3044 of printed book.*) 259

At a General Term of the Supreme Court, held in and for the Third Judicial Department, at the City Hall in Albany, on the 9th day of May, 1893.

Present—Hon. STEPHEN L. MAYHAM, *P.J.*
Hon. D. CADY HERRICK, *J.*

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AARON R. STEVENS, HARPER W. ROGERS, NANCY E. WILBUR, ANDREW A. DOUGLAS, as Trustee, etc., and IDA S. HARRISON, 260
Plaintiffs,

*against*

THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON, and others,
Defendants.

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An appeal from the judgment entered in Rensselaer County in this action, on the 11th day of November, 1891, having been taken to the General 261
Term by the defendant, the Central National Bank of Boston, Peter Butler, as receiver; the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, it is now, after hearing Mr. Hale for the aforesaid appellants, and Mr. Paige for the respondents,

Ordered that said judgment be and is in all things affirmed, with costs.

JAMES D. WALSH,
Clerk.

Filed in Rensselaer County.
JAS. D. WALSH, Clerk.

262 (*From the Record, folio 3062 of printed book.*)

SUPREME COURT.

AARON R. STEVENS and others,
Respondents,

*against*

THE CENTRAL NATIONAL BANK OF BOSTON, and other certificate
263 holders, Appellants, impleaded with others.

MEM. BY HERRICK, *J.*: This case has been once before this court (57 Hun, 499) upon substantially the same facts. Upon the new trial, the Court, in its decision, followed the judgment and opinion of the General Term, and I can see no reason for differing from that decision. The judgment appealed from should be affirmed, with costs.

MAYHAM, *P.J.*, concurred; PUTNAM, *J.*, not
264 acting.

*From the Record, folio 3054 of printed book.)* 265

SUPREME COURT.

AARON R. STEVENS and others,
Plaintiffs-Respondents,

*against*

THE UNION TRUST COMPANY OF NEW YORK, THE CENTRAL NATIONAL BANK OF BOSTON and others,
Defendants-Appellants. 266

GENTLEMEN:

Take notice that the defendants-appellants, the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Peter Butler, as Receiver of the Pacific National Bank of Boston, and the other certificate holders named as defendants in the above-entitled action, hereby appeal to the Court of Appeals of the State of New York from the judgment of the General Term of the Supreme Court herein, entered in the Clerk's office of the County of Rensselaer on the 25th day of May, 1893, affirming a judgment of this Court 267
entered in said Clerk's office on the 11th day of November, 1891, and for $155.20 costs, and from each and every part thereof.

Dated July 26, 1893.

Yours, etc.,
HALE & BULKELEY,
Attorneys for Appellants.

Office and Post Office Address,
25 North Pearl Street,
Albany, N. Y.

To the Clerk of the County of Rensselaer, and to
CAMPBELL & PAIGE, Esqs.,
Attorneys for Respondents.

268 (*From 49 Federal Reporter.*)

## IN THE CIRCUIT COURT OF THE UNITED STATES

### FOR THE NORTHERN DISTRICT OF NEW YORK.

THE CENTRAL NATIONAL BANK OF BOSTON

*vs.*

269 ROWLAND N. HAZARD and others.

WALLACE, Circuit Judge:

The petitioner asks the Court to set in motion one of its officers *pro hac vice*, who, by a decree made on the 24th day of March, 1887 (30 Fed. Rep. 484), was directed to sell at public auction, after giving due notice of the time and place of sale, according to law and the practice of this Court, certain real and personal property, consisting of the railroad, rolling stock, &c., which formerly
270 belonged to the Lebanon Springs Railroad Company. The petitioner invokes the action of the Court because a decree has been made by the Supreme Court of the State of New York in a suit brought subsequent to the rendition of the decree of this Court, which, among other things, perpetually enjoins and restrains the parties in this suit from proceeding with the sale of the property under the decree of this Court. The petitioner was not a formal party to the suit in the State Court, and, as the suit in this Court was prosecuted in his behalf, as one of those similarly situated with the complainant, he has a status which enables him to

intervene, as is supposed, without violating the injunction of the State Court. If there were any reason to impute contumacy to the officer who has halted in the performance of the duty imposed upon him by the Court, the appropriate application would be one for his removal; but it is apparent that his conduct is influenced by a desire to respect the injunction of a State Court, which in spirit, though not in terms, prohibits him from proceeding with the sale until the instructions of this Court have been obtained. 271

The case is this: Prior to the year 1880, the Lebanon Springs Railroad Company had mortgaged its property to secure bonds to the amount of $2,000,000, to the Union Trust Company, as trustee, and that mortgage had been foreclosed and the property sold, and, by mesne conveyances from the purchaser, the title to the property had been acquired by the New York, Boston and Montreal Railway Company. In the year 1880 an action was brought in the Supreme Court of the State of New York by one Sackett, who owned some of the mortgage bonds, in his own behalf, and that of all other owners of the bonds, the object of which was, in substance, to obtain an adjudication that the equitable title to the property was still in the bondholders, and a decree for a sale of the road for the benefit of the bondholders. During the pendency of the action the Court appointed a receiver, and authorized the receiver to issue certificates to the amount of $350,000, to constitute a first lien upon the property. That action resulted in a decree entered in January, 1885, adjudging that the title to the railroad property was in the original bondholders, and ordering the road to be sold for their benefit, subject to the principal and accrued interest upon the receiver's certificates. A sale was made pursuant to that decree, and upon the sale 272 273

274 Hazard & Foster became the purchasers. By the terms of the purchase Hazard and Foster assumed and agreed to pay the receiver's certificates, but after acquiring a deed they made default. The complainant in the present suit was the owner of $250,000 of the certificates, and in April, 1886, brought this suit, in behalf of itself and all the other certificate holders, to obtain a decree declaring the certificates to be a lien upon the property, and to enforce payment by the sale of the property and a personal judgment against Hazard & Foster for any deficiency. Hazard & Foster contested the suit, but it resulted in a decree adjudging the cer-
275 tificates to be a lien, ordering the sale of the property, and requiring Hazard & Foster to pay to the complainant, and the other holders of the certificates, any deficiency remaining unsatisfied after the sale of the property. The decree also reserved leave to the complainant and to the other certificate holders to apply to the Court at any time for the appointment of a receiver to take possession of the property, and keep it until the sale.

The property was duly advertised for sale pursuant to this decree, but the sale was adjourned from time to time, until late in the year 1890, when the suit
276 was brought by Stevens and others in the Supreme Court of the State of New York, in which the injunction was granted which has given rise to this application. Stevens was the owner of some of the bonds. The object of his suit was, in substance, to impeach the decree in the Sackett suit for fraud, and to obtain a strict foreclosure of the mortgage made by the Lebanon Springs Railroad Company. The theory of the action was that the Sackett suit had been prosecuted for the benefit of a portion of the bondholders, and in fraud of the interests of others. That suit resulted in a decree, by which it was adjudged that the Sackett suit was fraudu-

lently conducted as against certain of the bondhold- 277
ers whom he purported to represent, and solely in the interest of bondholders representing only about 1,200,000 of bonds. The decree vacated the judgment in the Sackett suit, ordered a sale of the property, declared that the owners of the receiver's certificates were entitled to only the distributive share of the proceeds of the sale as might be applicable to the bonds which were actually represented in the Sackett suit, and ordered the perpetual injunction which has been referred to.

No Federal Court has ever recognized the authority of a State Court to enjoin its proceedings, or 278
to enjoin parties from proceeding, in a suit in which the Federal Court has first acquired the jurisdiction of the controversy and the *res*, but such authority has been uniformly denied by the Federal Courts. McKim *vs.* Voorhies, 7 Cranch, 279; Riggs *vs.* Johnson Co., 6 Wall, 166; Mayor *vs.* Lord, 9 Wall, 409; Supervisors *vs.* Durant, Id., 415; Amy *vs.* Supervisors, 11 Wall, 136. "The forbearance which courts of co-ordinate jurisdiction, administered under a single system, exercise towards each other, whereby conflicts are avoided by avoiding interference with the process of each other, is a principle of comity, with perhaps no higher sanction 279
than the utility which comes from concord; but between State Courts and those of the United States it is something more. It is a principle of right and of law, and therefore of necessity. It leaves nothing to discretion or mere convenience. These courts do not belong to the same system so far as their jurisdiction is concurrent; and, although they coexist in the same space, they are independent, and have no common superior. They exercise jurisdiction, it is true, within the same territory, but not in the same plane; and when one takes into its jurisdiction a specific thing, that *res* is as much with-

280 drawn, from the judicial power of the other as if it had been carried physically into a different territorial sovereignty. To attempt to seize by a foreign process is futile and void. The regulation of process, and the decision of questions relating to it, are part of the jurisdiction of the Court from which it issues" (Covell *vs.* Heyman, 111 U. S., 183, 4 Sup. Ct. Rep., 355). These principles were recognized and enforced by one of the Federal Courts in a case which is very much in point. In *Fox* vs. *Railroad Co.*, 2 Abb. (U. S.), 151, a court of the State of Pennsylvania had proceeded to a decree in
281 a suit to foreclose a mortgage executed by the railroad company, and after the decree, and pending a sale ordered by the decree, executions were issued upon judgments rendered by the United States Circuit Court, and levies were made upon the mortgaged property. The Federal Court set aside the levy, holding that the court of Pennsylvania having by its decrees and authorized officers taken judicial control of the property, and ordered its sale, the property could not be taken in execution by process from any other jurisdiction.

In the present case, after the decree was made by this Court ordering the property to be sold by
282 its officer, and the officer had proceeded towards executing the decree by advertising the property for sale, the property was under the dominion of this Court as effectually as though it had been seized upon an execution. And it is equally clear that after the sale had taken place under the decree in the Sackett suit, and the property had been conveyed to Hazard and Foster, the property passed from the dominion which the State Court had previously exercised over it. The Stevens suit was an original and independent proceeding, not a supplementary proceeding connected with the Sackett

suit. As was said in Barrow *vs.* Hunton, 99 U. S. 283
80:

"If the proceedings are tantamount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding; * * * a new case arising upon new facts, although having relation to the validity of an actual judgment or decree."

The case, therefore, is one for the application of the rule that the jurisdiction of a court of the United States once obtained over property by its being brought within its custody continues until the purpose of the suit is accomplished, and cannot be impaired or affected by any proceedings subsequently 284
commenced in a State Court (*Railroad Co.* vs. *Gomila, 132 U. S., 478, 10 Sup. Ct. Rep. 155.*

It is not necessary to consider whether a State Court, in the exercise of equity jurisdiction, may not annul the judgment of a Federal Court for fraud, and, as an incident to relief, enjoin the enforcement of the judgment to the extent necessary to do justice (*Johnson* vs. *Waters, 111 U. S., 640, 4 Sup. Ct. Rep., 619*). In the present case the State Court has not assumed to disturb the decree of this Court. It has adjudged that the lien of the certificate holders has no priority over that of the 285
bondholders, but is one to be satisfied *pari passu* with theirs; and by its decree it subordinates the title which will be acquired under the sale by this Court to the title which will be acquired by a sale under its own decree. The decree of this Court finally determines the rights of the parties of the suit as between themselves. Manifestly the decrees of the State Court does not disturb the right of the certificate holders to enforce the payment of their certificates against Hazard and Foster by a sale of their property and a personal judgment for the deficiency. A personal judgment cannot be

286 obtained under the present decree without a sale of the property, in order to ascertain the deficiency and fix the amount recoverable. Such a sale cannot injuriously affect the property interests which are recognized and protected by the decree of the State Court. A sale under its decree will extinguish all subordinate titles, good as well as bad.

It would be rank injustice to the complainant and the other certificate holders to postpone the enforcement of their demands against Hazard and Foster to await the result of the litigation in the State Court, which seems likely to be a protracted
287 one. The order applied for is therefore granted.

288

(*From the Record—Printed Pamphlet.*) 289

IN THE COURT OF APPEALS OF NEW YORK.

AARON R. STEVENS, IDA S. HARRISON and others,
Respondents,

*against*

THE UNION TRUST COMPANY and others, and THE CENTRAL NATIONAL BANK OF BOSTON and others, 290
Appellants.

Stipulated that the motion noticed as within, be heard with the appeal in the same case.

HALE, BULKELEY & TENNANT, Attorneys for Appellants.

CAMPBELL & PAIGE, Attorneys for the Plaintiffs.

EDWARD WINSLOW PAIGE, Attorney for Lebanon Springs Railroad, for this motion. 291

292 COURT OF APPEALS.

AARON R. STEVENS and others

*against*

THE UNION TRUST COMPANY OF NEW YORK and others.

SIRS: You will take notice that on behalf of the plaintiffs in the above action, and the Lebanon
293 Springs Railroad, we will move the Court of Appeals at the Capitol, in the City of Albany, on the fourteenth of June, 1894, that the appeals in the above action be dismissed and the judgment therein be affirmed, and for such other and further relief as to the Court shall seem just. That such motion will be made upon the deed of William Foster, Jr., and wife, to the Lebanon Springs Railroad, the resolution of the directors of that company and the stipulation and consent of that company, copies of which are hereto annexed, and also upon the deed of Worthington Frothingham, referee, to William
294 Foster, Jr., and the appeal book in the action, copies of both of which are in your possession.

CAMPBELL & PAIGE,
Attorneys for Plaintiffs,
44 Cedar Street, N. Y.

EDWARD WINSLOW PAIGE,
Attorney for L. S. R.R., for this motion.

To MESSRS. HALE, BULKELEY & TENNANT, Attorneys for Central National Bank and others.

It being suggested that the appeal in Stevens against Union Trust Company and others, of the

Central National Bank of Boston and others, holders of certificates issued by Van Valkenburgh, when receiver, will shortly be reached in the Court of Appeals; and it is also being suggested that this company owns all the interest of those appellants by virtue of the deed of Worthington Frothingham, Esq., Master *pro hac vice* appointed by the Circuit Court of the United States, to William Foster, Jr., and the deed of William Foster, Jr., and wife, to this company. 295

*Resolved*, That the judgment in this action be affirmed; that the pending appeals be withdrawn; that the president execute in the name of the company, a stipulation and consent to the plaintiffs for the affirmance of the judgments and the withdrawal of the appeals, and to that end that the president employ and direct counsel for and in the name of the company to consent to and assist in any motion which may be made by the plaintiffs for the dismissal of the appeal and the affirmance of the judgment. 296

I CERTIFY that the above is a copy of resolution of the board of directors of the Lebanon Springs Railroad, and that the same was unanimously passed at a Special Meeting called pursuant to the by-laws, and held in the City of New York on the twenty-fourth of April, 1894. 297

WILLIAM V. REYNOLDS,
*President.*

THE LEBANON SPRINGS RAILROAD does hereby consent and stipulate that the judgment in the action of Aaron R. Stevens and others, against the Union Trust Company and others, from which appeals are now pending in the Court of Appeals,

298 be affirmed; and that the appeals pending therein be withdrawn.

New York, April 24th, 1894.

THE LEBANON SPRINGS RAILROAD,
By WILLIAM V. REYNOLDS,
*President.*

THIS INDENTURE, made this ninth day of June, one thousand eight hundred and ninety-three, between William Foster, Jr., and Caroline M. Foster, his wife, both of the City of New York, of the first part, and the Lebanon Springs Railroad, of the
299 second part, witnesses as follows:

That the said parties of the first part in consideration of a plan of agreement for the readjustment of the interests of the creditors and stockholders of the Lebanon Springs Railroad Company and its successors, made the fourteenth day of May, 1892, and also in consideration of one dollar to them paid by the Lebanon Springs Railroad, the receipt of which is hereby acknowledged, have bargained, sold, and by these presents do grant and convey unto the said party of the second part and its successors and assigns forever, all the premises, prop-
300 erty, franchises and powers described as follows, to wit:

All the franchises and powers conferred upon the Lebanon Springs Railroad Company by the following acts of the Legislature of New York, each of which was duly passed upon the date hereinafter stated, that is to say:

"An Act to authorize the Lebanon Springs Rail-"road Company to construct an extension of its "road into Massachusetts and Vermont, and to "provide means therefor," passed March 8th, 1853, and being Chapter 25 of the laws of that year.

"An Act to amend an act entitled 'An Act to

" ' authorize the Lebanon Springs Railroad Com- 301
" ' pany to construct an extension of its road into
" ' Massachusetts and Vermont and to provide
" ' means therefor,' passed March 8th, 1853,"
passed June 24th, 1853, and being Chapter 461 of
the laws of that year.

" An Act to enable certain connecting railroad
" companies to aid in the construction of the Leb-
" anon Springs Railroad," passed April 12th,
1855, and being Chapter 350 of the laws of that
year.

" An Act to extend the time for the completion
" of the Lebanon Springs Railroad," passed March
23d, 1857, being Chapter 150 of the laws of that 302
year.

" An Act to extend the time for the completion
" of the Lebanon Springs Railroad," passed April
12th, 1860, and being Chapter 285 of the laws of
that year,

" An Act to extend the time for the completion
" of the Lebanon Springs Railload," passed April
22d, 1862, and being Chapter 444 of the laws of
that year.

" An Act to amend the charter of the Lebanon
" Springs Railroad Company," passed April 9th,
1864, and being Chapter 145 of the laws of that 303
year.

" An Act to authorize any town in the counties
" of Columbia or Rensselaer to aid in the comple-
" tion of the Lebanon Springs Railroad," passed
April 4th, 1866, and being Chapter 373 of the laws
of that year.

" An Act to extend the time for the completion
" of the Lebanon Springs Railroad," passed 26th
February, 1867, and being Chapter 46 of the laws
of that year.

And all the powers and franchises of railroad
corporations stated in "An Act to authorize the

304 "formation of railroad companies, and to regulate "the same," passed by the Legislature of New York, April 2d, 1850, and the several acts amendatory thereof and supplementary thereto and the powers to purchase, construct and operate the railroad hereinafter described, extending from Chatham Four Corners, in the County of Columbia, northerly through the counties of Columbia and Rensselaer to the borders of the State of Vermont, and into that State to the village of Bennington, and also the certain other special and particular powers and franchises stated in the above acts, and also the
305 following powers and franchises, to wit:

To exercise all the powers and authorities in respect to the constructing, holding and operating the part of said railroad within the State of Vermont, and the management of the business thereof, which might be done if that part were within the State of New York.

To create preferred stock at such rate of dividend, or interest, and with such securities therefor as may be deemed expedient.

To extend the road by construction or purchase, into the States of Vermont or Massachusetts, as far as is or may be permitted by the authority of said
306 states.

To consolidate with any company or companies having a railroad or the right to build a railroad, which it—the Lebanon Springs Railroad Company —was authorized to construct or acquire on such terms as the parties should agree upon, or the States of Vermont and Massachusetts should require; and

To consolidate either alone or after consolidation with any company into a single corporation, with any company having a railroad, which, or a portion of which should be within the State of New York, and which should connect with the railroad of the

Lebanon Springs Railroad Company at its terminus, in the same manner as the railroad companies mentioned in "An Act to authorize the consolida- "tion of certain railroad companies," passed by the Legislature of New York, April 2d, 1853. 307

To exercise all the powers with respect to the railroads or portions of railroads which might be constructed or acquired within the States of Vermont and Massachusetts as may be exercised if the same were wholly within the State of New York.

To have corporate stock and bonds taken and owned or guaranteed by any company having or being authorized to construct a railroad connecting with the lines of railroad of the said Lebanon Springs Railroad Company, and to have any such company's aid by loan of money or credit, and by the raising of means and securing any contract for such purpose in any manner in which the company so aiding might do for the construction of its own railroad. 308

To change the northern terminus of the railroad from the Massachusetts State Line as declared in the articles of association of the Lebanon Springs Railroad Company to any point within the town of Hoosick, in the County of Rensselaer, or the town of White Creek, in the County of Washington. 309

To construct a branch to a terminus at the Vermont State line, at a point of junction with the Western Vermont Railroad, now known as the Bennington and Rutland Railway.

To construct a branch with a terminus in either or both of the cities of Albany and Troy, with the same effects as if the line had been originally fixed in the articles of association both as to the main line and branches as the same are last above described, and the terminal thereof had been its original terminus.

Also all powers and franchises conferred by the

following acts, which were duly passed by the Legislature of the State of Vermont, to wit:

"An Act to incorporate the Vermont and New "York Railroad Company," approved November 2d, 1865, and being No. 134 of the laws of that year.

"An Act to amend an act entitled 'An Act to "incorporate the Vermont and New York Rail- "road Company,'" approved November 2d, 1865, approved November 19th, 1866, and being No. 167 of the laws of that year.

"An Act authorizing the Bennington and Rut- "land Railroad Company to consolidate their road "with the road of the Lebanon Springs Railroad "Company," approved November 21st, 1867, and being No. 155 of the laws of that year.

"An Act to enable the Bennington and Rutland "Railroad Company to aid in obtaining necessary "railroad connections," approved March 28th, 1867, and being No. 2 of the Special Sessions of that year.

And the powers and franchises of railroad corporations under the laws of Vermont, and the powers and franchises to build, own and operate a railroad from Bennington to the Vermont State Line, being that portion of the railroad hereinafter described, which is in the State of Vermont, and to transfer and convey such powers and franchises and any property, and to consolidate with railroad companies.

And also the following described property, to wit:

All and singular the tracks or roadway of the Lebanon Springs Railroad, from Chatham Four Corners, in the County of Columbia, to the east line of the State of New York, in the town of Hoosick, in the County of Rensselaer, and all the lands acquired and hereafter to be acquired for the

purpose of forming said track or roadway; also the 313
railroad of the said Lebanon Springs Railroad Company already built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues and profits of any and all of the same, and of all of the above-mentioned powers and franchises; and also all the rolling stock, locomotives, tenders, snow-plows, scrapers, passenger cars, baggage, mail and express cars, freight, stock and dumping cars, flat cars and cars of every description. All the machine-shops and blacksmith- 314
shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of cars; and also the Vermont and New York Railroad constructed from the terminus of the railroad last above described in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the equipment and all the above-mentioned powers and franchises of the said Vermont and New York Railroad Company, belonging to or in any-wise appertaining to, or which may at any time belong to or appertain to, or have belonged to or appertained to the same or either of said railroads or companies, as well in 315
law as in equity; including also all property of every kind, name or nature of, or purchased by or now or heretofore in the possession of the Lebanon Springs Railroad Company, either of the corporations called the Harlem Extension Railroad Company, the Vermont and New York Railroad Company, John W. Van Valkenburgh, as receiver, the New York, Rutland and Montreal Railway Company, and William V. Reynolds, as receiver; and including also all property, powers and franchises of every name and nature described or mentioned in or subject to the

316 lien of the mortgage executed by the Lebanon Springs Railroad Company, and bearing date first of July, 1867, or of the mortgage executed by the Harlem Extension Railroad Company, and bearing date first of April, 1870; and also all property of every name and nature described in or subject to the lien of the mortgage executed by the New York, Rutland and Montreal Railway Company to the American Loan and Trust Company.

And also all the property described in a certain mortgage made by Jas. C. Hull and wife and Chas. G. Lincoln, to Wm. Butler Duncan and Trenor W.
317 Park, which said mortgage bears date the twenty-eighth of January, 1873, was made to secure the payment of five millions of dollars and interest and was recorded in Rensselaer County Clerk's Office, February 14th, 1873, in Book No. 137 of Mortgage, page 344; and also recorded in Bennington County Clerk's Office, Vermont, May 1st, 1873, at 4 hours, 30 minutes P.M.

And also all the premises, property, franchises and powers conveyed to the said William Foster, Jr., party of the first part, by either of the following deeds, that is to say:

318 1. A deed made to the said William Foster, Jr., by John L. Henning, Referee, appointed by judgment of the Supreme Court of New York, entered in Rensselaer County eleventh of November, 1891, and amended 5th of April, 1892, in an action in which Aaron R. Stevens and others were plaintiffs, and the Union Trust Company of New York and others were defendants. Said deed bears date the sixteenth day of May, 1892, and was acknowledged on the twenty-eighth of May, 1892.

2. A deed made to the said William Foster, Jr., by the New York, Boston and Montreal Railway Company, bearing date the seventeenth day of

May, 1892, and acknowledged the twenty-seventh day of May, 1892. 319

3. A deed made to the said William Foster, Jr., by William Butler Duncan, and by John G. McCullough, as administrator of the goods, chattels and credits of Trenor W. Park, deceased, bearing date the seventeenth day of May, 1892, and acknowledged the fifth of January, 1893, and the sixth of April, 1893.

4. A deed made to the said William Foster, Jr., by Worthington Frothingham, as Referee, appointed by a decree of the Circuit Court of the United 320
States for the Northern District of New York, passed twenty-fourth March, 1887, in an action in equity in which the Central National Bank of Boston was complainant and Rowland N. Hazard and others were defendants. Said deed bears date the twenty-fifth day of April, 1892, and was acknowledged on the twenty-seventh day of April, 1892.

To have and to hold all and singular the premises, property, franchises and powers above mentioned and described, unto the said party of the second part, its successors and assigns, forever.

In witness whereof, the parties of the first 321
part have hereunto set their hands and seals, the day and year first above written.

WM. FOSTER, JR.
CAROLINE M. FOSTER.

Signed, sealed and delivered in presence of }

GEORGE W. OAKLEY.

322 STATE OF NEW YORK, }
City and County of New York, } ss.:

On this ninth day of June, 1893, before me personally came William Foster, Jr., and Caroline M. Foster, his wife, known to me and to me known to be the persons described in and who severally acknowledged to me that they executed the within instrument.

GEORGE W. OAKLEY,
Commissioner of Deeds,
City and County of New York.

323

DEED.

This indenture, made this twenty-fifth day of April, in the year of our Lord, one thousand eight hundred and ninety-two, between Worthington Frothingham, of Albany, N. Y., Referee in the action hereinafter mentioned, of the first part, and William Foster, Jr., of the City, County and State of New York, of the second part;

Whereas, at a Special Term of the Circuit Court of the United States, held in and for the Northern District of New York, at the Chambers of the Circuit Judge in the City of Syracuse on
324 the 24th day of March, 1887, it was among other things, ordered, adjudged and decreed by the said Court in a certain action then pending in the said Court, between the Central National Bank of Boston, which sues as well for itself as for all others similarily situated, plaintiff, and Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company and The American Loan and Trust Company of New York, defendants, that all and singular, the premises, franchises and property mentioned in the complaint in said action, and hereinafter described, and in said decree described, or so much thereof as might

be sufficient to satisfy the amount due and unpaid 325
on the Receiver's certificates mentioned in the complaint in said action, and expenses of sale, and the costs of this suit, and which might be sold separately without material injury to the parties interested, be sold at public auction in the County of Rensselaer in said Northern District of New York, according to the course and practice of said Court, by or under the direction of the said Worthington Frothingham, who was appointed a referee in said action, and to whom it was referred by the said decree of the said Court, among other things, to make such sale; that the said sale be made in the county where the said premises, franchises and 326
property, or the greater part thereof, are situated; that the said referee give public notice of the time and place of such sale, according to law and the rules and practice of said Court, and that any of the parties in said action might become a purchaser or purchasers on such sale; that the said Referee execute to the purchaser or purchasers of the said premises, franchises and property, or such part or parts thereof, as shall be sold, a good and sufficient deed or deeds of conveyance for the same.

And whereas the said Referee in pursuance of the said decree of the said Court, did on the 23d 327
day of March, one thousand eight hundred and ninety-two, sell at public auction at two o'clock in the afternoon of that day at the outer westerly door of the Court House in the City of Troy, County of Rensselaer and State of New York, the premises, franchises and property in said decree mentioned, due notice of the time and place of such sale being first given, agreeably to the said decree; at which sale the premises, franchises and property hereinafter described were struck off to the said party of the second part, for the sum of seven thousand

five hundred dollars, that being the highest sum bid for the same.

Now this indenture witnesseth, that the said Referee, the party of the first part to these presents, in order to carrry into effect the sale so made by him as aforesaid, in pursuance of the decree of the said Court, and in conformity to the statute in such case made and provided, and also in consideration of the premises, and of the said sum of money so bidden as aforesaid, having been first duly paid by the said party of the second part, the receipt whereof is hereby acknowledged, hath bargained and sold, and by these presents, doth grant and convey unto the said party of the second part, the premises, franchises and property directed by said decree to be sold, and described therein as follows: The premises and property described as contained in a certain mortgage made by the Lebanon Springs Railroad Company to the Union Trust Company, and which were conveyed by a deed executed by George McClellan, Referee, to William Foster, Jr., and Rowland N. Hazard as follows: "All the right, title and interest of the said party of the first part (said Lebanon Springs Railroad Company) of, in and to all and singular the track or roadway of the party of the first part, from the Chatham Four Corners in the County of Columbia to the east line of the State of New York, in the town of Hoosick, in the County of Rensselaer, and all lands thereafter to be acquired for the purpose of forming said track or roadway; also the railroad of the said party of the first part, now built or to be built, and all the rails, bridges, fences, stations, station-houses, wood-houses, buildings and other structures and appurtenances thereunto belonging, and also all the tolls, incomes, rents, issues, and profits and alienable franchise of the said party of the first part, connected with said railroad, or relating there-

to, including its rights and franchises as a corporation; and also all the rolling stock, locomotives, tenders, snow ploughs and scrapers and all the passenger cars, baggage, mail and expresss cars, freight, stock and dumping cars, flat cars and cars of every description; all the machine shops and blacksmith shops, and all the articles used in the construction, replacing and repairing of roads and cars, and in the running of the cars, now owned or hereafter to be acquired by the said party of the first part; all of which chattels are declared to be fixtures and appurtenances to said railroad, and are to be sold therewith, and not separate therefrom, and to be taken as a part thereof; and also all the right, title and interest which the said party of the first part may have or may hereafter acquire of, in and to the Vermont and New York Railroad, constructed or to be constructed from the terminus of the railroad of the party of the first part in the town of Hoosick aforesaid, to the village of Bennington, in the State of Vermont, including all the right, title and interest of the party of the first part of, in and to the franchise and equipment of the said Vermont and New York Railroad, belonging or in any wise appertaining, or which may at any time belong or appertain to the same as well in law as in equity."

331 332 333

TO HAVE AND TO HOLD all and singular the premises, franchises and property above mentioned and described and hereby conveyed unto the said party of the second part, his heirs and assigns forever.

IN WITNESS WHEREOF, the said party of the first part, Referee as aforesaid, hath hereunto set his hand and seal the day and year first above written.

WORTHINGTON FROTHINGHAM, [SEAL.]
Referee.

In presence of
WM. S. BEERS.

334 STATE OF NEW YORK, City and County of Albany, } ss.:

On this 27th day of April, in the year one thousand eight hundred and ninety-two, before me, the subscriber, personally came Worthington Frothingham, Referee, to me known to be the person described in and who executed the within instrument, and duly acknowledged that he executed the same.

WM. S. BEERS,
Notary Public,
Albany Co., N.Y.

[SEAL.]

335 STATE OF NEW YORK, City and County of Albany, Clerk's Office, } ss.:

I, ANSEL C. REQUA, Clerk of the said City and County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify that Wm. S. Beers, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument in writing, and endorsed thereon, was at the time of taking such proof or acknowledgment, a Notary Public, in and for the County aforesaid, dwelling in the said County, and duly authorized to take the same; and
336 that I am well acquainted with the handwriting of the said Notary and verily believe that the signature to the said certificate or proof of acknowledgment is genuine; and that the said instrument is executed and acknowledged according to the laws of the State of New York.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal as County Clerk of said Courts, this 27th day of April, 1892.

[SEAL.]

A. C. REQUA,
Clerk.

UNITED STATES OF AMERICA,
Circuit Court Clerk's Office,
Northern District of New York. } 337

I, WILLIAM S. DOOLITTLE, Clerk of said Court, do hereby certify that I have compared the annexed copy of order confirming report of sale, The Cent. Natl. Bk. of Boston, which sues, &c., *vs.* R. N. Hazard and others, in Equity No. 5575, and the endorsements thereupon, with the original now on file in this office, that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have caused the seal 338
of the said Court to be affixed at the City
[SEAL.] of Utica, in said District, this 30th day
of October, A.D. 1895.

W. S. DOOLITTLE,
Clerk.

339

340 At a term of the Circuit Court of the United States in Equity sitting, held in and for the Northern District of New York, at the Court House in the Village of Canandaigua, on the 22d day of June, 1892.

Present—Hon. WILLIAM J. WALLACE,
Judge.

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THE CENTRAL NATIONAL BANK OF BOSTON, which sues as well for
341 itself as for all others similarly situated,

*against*

ROWLAND N. HAZARD, WILLIAM FOSTER, JR., and others.

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On reading and filing the report of Worthington Frothingham, the Referee duly appointed herein to sell the premises and property mentioned and described in the decree and in the bill of complaint
342 herein, and on proof of due service of the affidavit of Alpheus T. Bulkeley, and the order to show cause herein, dated June 18th, 1892, on the attorneys for the respective parties herein, and on Marchus T. Hun, attorney for E. H. Bonner & Co., on motion of Hale & Bulkeley, solicitors for the complainant, no one appearing in opposition thereto,

It is ordered that the said report of sale of the said Referee be and the same hereby is in all things confirmed.

WM. J. WALLACE.

(*From the Record—Typewritten following printed pamphlet.*) 343

COURT OF APPEALS.

AARON R. STEVENS and others,
Respondents,

*against*

THE CENTRAL NATIONAL BANK OF BOSTON and other defendants, holders of Receiver's certificates, impleaded, &c.,
Appellants. 344

City and County of New York, ss.:

ALPHEUS T. BULKELEY, being duly sworn, says: That he is one of the attorneys for the appellants in the above-entitled action. Deponent further says that after the rendition of the judgment in the above-entitled action, William Foster, Jr., one of the defendants in said action, brought another 345 action in the N. Y. Supreme Court against the said Central National Bank of Boston and other defendants, including the certificate holders who are defendants in this action, in which the prayer of the complaint was, among other things, that as to so much of the decree of the Circuit Court of the United States, dated March 24, 1887, as orders, adjudges or decrees that plaintiff, said William Foster, Jr., either alone, or with Rowland N. Hazard, pay to the said Central National Bank of Boston, and to the other of said certificate holders, or either or any of them, the residue of the in-

346 debtedness on said certificates, remaining unsatisfied after the sale of said property, and the application of the proceeds thereof, the plaintiff is entitled to have the same annulled, and the enforcement thereof perpetually enjoined; and that as to so much of the decree of the said United States Circuit Court as adjudges that the said Central National Bank of Boston and other certificate holders have execution for the residue or any part of said indebtedness, the plaintiff is entitled to have the same annulled and the enforcement thereof perpetually enjoined; and that it be adjudged
347 that the defendants, and each of them, their attorneys, counsel, &c., be perpetually restrained and enjoined from issuing any execution against the plaintiff or his property, or any part thereof, under the said decree of the Circuit Court of the United States, or taking proceedings in the said Court or otherwise, for the purpose of enforcing the payment or collection of the said certificates, or any of them, or any part of the same; and that defendants be enjoined from permitting or suffering any such execution to be issued or any such proceedings to be taken in the name of them or any of them, or on their behalf; and that it be adjudged
348 that the said Central National Bank and the said certificate holders, and each of them, execute on the demand of the plaintiff and deliver to him, duly proved or acknowledged so as to admit to record, a proper release or satisfaction of the said decree in so far as it requires the plaintiff, the said William Foster, Jr., to make any payment to the Central National Bank and to the other of said certificate holders, or directs that the said bank and the other certificate holders have execution against the plaintiff or his property, or any part thereof.

The complaint of the said William Foster, Jr.,

plaintiff in said action, sets forth among other 349
things, the judgment in this action, from which an appeal to the New York Court of Appeals is now pending, a copy of which is annexed to his complaint, as Exhibit B, and made a part of said complaint; and the complaint bases his claim for the relief asked for in said complaint, upon the said judgment in this action. In said action, in which said Foster was plaintiff, Mr. Justice Putnam granted a temporary injunction enjoining and restraining the said Central National Bank of Boston and the other certificate holders defendants in said action, from issuing execution upon the said decree 350
of the Circuit Court of the United States for the purpose of enforcing the payment or collection of any of said certificates of indebtedness. The said Central National Bank of Boston, one of the defendants in said action, afterwards filed its petition under the laws of the United States, and the said action was removed into the Circuit Court of the United States for the Northern District of New York, and since said removal, the said Circuit Court of the United States has vacated the injunction therein granted by Mr. Justice Putnam and the said action is now pending and undetermined in the said Circuit Court of the United States. 351

Deponent further says that the said Central National Bank of Boston in its answer in said action wherein the said William Foster, Jr., is plaintiff, now pending in the Circuit Court of the United States, sets up and claims that the Supreme Court of the State of New York did not have and has not jurisdiction and power to deprive said defendant and the other certificate holders represented by it in that suit of the benefit of said decree rendered by the Circuit Court of the United States or any part thereof or any remedies to which it and the other certificate hold-

352 ers are entitled under the rules and practice of said Circuit Court of the United States, and hereby refers to the answer in said action.

Deponent further says, upon information and belief, that it is contended and claimed by the counsel for the said Foster in said action that the sale of the premises described in the complaint under the said decree in the United States Circuit Court, is void for the reason that the same was made in disobedience to the said injunction con tained in the judgment in this action, and that one of the grounds upon which said William Foster,
353 Jr., is in said action, seeking to perpetually enjoin the said Central National Bank of Boston and the other certificate holders, defendants in said action, from issuing execution against him, is that the said sale of said premises was void for the reason above stated, and that, therefore, the said Central National Bank of Boston had no right to issue execution against the said Foster, said right under said decree being dependent upon a legal and valid sale having taken place, of the premises described in the bill of complaint in the said suit wherein the said Central National Bank of Boston was complainant and the said William Foster, Jr., and
354 others were defendants.

Deponent further says, upon information and belief, that it is important for the interests of the said The Central National Bank of Boston and the other certificate holders, appellants in this action, in view of the suit now pending in the Circuit Court of the United States wherein said William Foster, Jr., is plaintiff, to carry on and prosecute the appeal from the judgment in this action.

Deponent further says that proceedings have been instituted in the Supreme Court of this State against one of the appellants herein, upon an application to punish him for contempt in not obey-

ing the provisions of the said judgment in this 355
action, enjoining the defendants certificate holders from procuring or suffering a sale of said premises to take place, which application has never been decided so far as deponent has learned, but is still pending before the Special Term of said Supreme Court.

Deponent further says that William V. Reynolds, whose name is attached to the so-called consent and stipulation appended to the notice of motion to dismiss the appeal herein, was, at the time of the commencement of this action, on the motion of Mr. Paige, counsel, and one of the at- 356
torneys for plaintiffs, appointed receiver of the Lebanon Springs Railroad Company in this action, and has ever since, as deponent is informed and believes, been in possession of the railroad premises described in the complaint, either as such receiver or as the agent of William Foster, Jr.; and has been during all said period in the interest of the plaintiffs, or of the attorneys and counsel for plaintiffs, and acting in conformity with their wishes; and deponent says, upon information and belief, that the resolution and consent referred to in the notice of motion, have been adopted and executed by the direction and in the interest of the plain- 357
tiffs, or the attorneys for plaintiffs, and also in the interest and for the benefit of the defendant William Foster, Jr.

ALPHEUS T. BULKELEY.

Sworn to before me this 20th day of October, 1894.

WM. S. BEERS,
Notary Public,
Albany Co., N. Y.

358 (*From the Record, follows Bulkeley's affidavit.*)

In November Term of the Court of Appeals of the State of New York.

On the 27th day of November, 1894, judgment was duly given and rendered in and by said Court of Appeals, whereby the said judgment of the said Supreme Court was in all things affirmed, with costs.

The following is the opinion delivered in the Court of Appeals of the State of New York:

359 AARON R. STEVENS *et al.*,
Respondents,

*vs.*

THE CENTRAL NATIONAL BANK OF BOSTON *et al.*, impleaded, etc.,
Appellants.

Appeal from judgment of the General Term of the Supreme Court, in the Third Judicial Department, entered upon an order made May 9th, 1893, which affirmed a judgment in favor of plaintiffs
360 entered upon a decision of the Court on trial at Special Term.

The nature of the action and the facts, so far as material, are stated in the opinion.

MATTHEW HALE, for appellants.
EDWARD WINSLOW PAIGE, for respondents.

BARTLETT, *J.:*

This appeal involves a contest between the bondholders and holders of receiver's certificates of the Lebanon Springs Railroad Company and its successor, the Harlem Extension Railroad Company.

A recital of the main facts in this litigation is 361
essential, as it will present clearly the questions of law submitted for our determination.

The Lebanon Springs Railroad Company, in 1869, was operating its completed road from Chatham, New York, to Bennington, Vermont; prior to that time, in July, 1867, it issued and sold its bonds to the amount of two millions of dollars and secured the same by mortgage to the Union Trust Company of New York, in trust, covering its property, rights and franchises.

Early in the year 1870, the Lebanon Springs Railroad Company consolidated with the Benning- 362
ton and Rutland Railroad Company of Vermont, and the new corporation took the name of the Harlem Extension Railroad Company.

This latter company in April, 1870, made its mortgage to the Union Trust Company of New York, in trust, to secure the payment of four millions of dollars of its bonds, but only one million four hundred thousand dollars of this issue were negotiated.

In Febrnary, 1872, the Union Trust Company began the foreclosure of the first-named mortgage in the Supreme Court of New York, and later in the same year it filed bills in the Court of Chancery 363
in Vermont, to foreclose both mortgages in that jurisdiction.

In December, 1872, and while the suits mentioned were pending, the Harlem Extension Railroad Company consolidated with corporations not material to mention in this connection, and assumed the name of the New York, Boston and Montreal Railway Company.

In January, 1873, the property covered by the two million mortgage in this State, was sold and conveyed, in the Union Trust Company foreclosure suit, to James C. Hull, a clerk in the office of the

364 defendant William Butler Duncan, for the nominal sum of one hundred thousand dollars, and about the same time there were sales under the Vermont decrees and conveyances, executed to Charles G. Lincoln, a clerk for one Trenor W. Park, for the nominal sum of fifty thousand dollars.

It is found in this action, that the Union Trust Company never did anything to enforce the payment of these bids, and that they were never paid.

On the 28th of January, 1873, Hull and Lincoln, without any consideration, executed to the defendant William Butler Duncan and one Trenor W.
365 Park, a bond for the payment of five millions of dollars, secured by a mortgage covering the property conveyed to them under the foreclosure sales in New York and Vermont.

It is found in this action, that both Duncan and Park knew that the consideration for the deeds of Hull and Lincoln remained unpaid. On the 30th of January, 1873, Hull and Lincoln conveyed the property, without consideration and subject to the Duncan and Park mortgage, to the New York, Boston and Montreal Railway Company.

The five million dollar mortgage made to Duncan and Park, represented substantially the aggre-
366 gate indebtedness which the New York, Boston and Montreal Railway Company was to assume under the consolidation and other agreements.

The latter company paid to Duncan and Park $807,077.05, on account of the money due on said mortgage, but failed to pay the balance, became insolvent, and in April, 1875, Daniel Butterfield was appointed by the Supreme Court of the State of New York Receiver of all its property and effects.

During the year 1873 the New York, Boston and Montreal Railway Company executed to Seligman, Sherman and Brown, a mortgage to secure bonds of the aggregate amount of twelve

millions, two hundred and fifty thousand dollars, also another mortgage to the New York Loan and Indemnity Company, to secure the payment of additional bonds to the aggregate amount of twelve millions, seven hundred and fifty thousand dollars. 367

A sufficient amount of these bonds were sold in Europe to realize six millions of dollars.

In November, 1873, the New York, Boston and Montreal Railway Company, leased its road to the Central Vermont Railway Company, which lease was operated until August 20, 1877, when it was abandoned.

In the meantime the lessor company had become insolvent, as already stated, and in September, 1877, one Russell C. Root took possession of the property without legal right, and subsequently, on November 27, 1877, delivered possession thereof to a corporation called the Harlem Extension Railroad South Coal Transportation Company. 368

Root, in the name of this company and as its President, continued to operate the road until possession was taken from him by the court, as will presently appear.

In September, 1880, one Marvin Sackett, bondholder of the Lebanon Springs Railroad Company, brought an action in the Supreme Court of New York, against Russell C. Root, The Harlem Extension Railroad South Coal Transportation Company, the New York, Boston and Montreal Railway Company, and Daniel Butterfield, as its Receiver. Sackett alleged in his complaint that he brought the action in behalf of himself and all other bondholders of the Labanon Springs Railroad Company similarly situated, who hold any of the two millions of dollars of the bonds of the Lebanon Springs Railroad Company, hereinafter referred to, and who shall be entitled to avail themselves of the benefit of this suit." 369

370 The complaint further alleged the mortgage to secure plaintiff's bond to the Union Trust Company of New York, the action to foreclose, the sale thereunder, and the non-payment of the purchase money to the trustee.

In brief, the Sackett suit was ostensibly a representative action for the benefit of bondholders, and sought apparently to charge Duncan and his clerk, Hull, who took title at the foreclosure sale in this State, as trustees for the bondholders. The complaint further prayed for a receiver and sale of the property; that all titles under the foreclosure sale
371 should be declared void, and for such other relief as was just.

It will be observed that while the Sackett suit professes to seek the objects indicated, that it failed to bring before the Court the necessary parties to render such a decree as was prayed for binding, viz.: the Union Trust Company of New York, Duncan, Park, Hull, Lincoln, and the trustees under the mortgages.

The record in the Sackett suit also discloses some other remarkable features.

In October, 1880, John Van Valkenburgh was appointed receiver. Intermediate the appointment
372 of the re eiver and February 1st, 1881, holders of large amc nts of both Lebanon Springs and Harlem Extension bonds petitioned the Court in two separate proceedings, to be made parties to the action, but both applications were denied. After the denial of these motions, and in February, 1881, the receiver petitioned for instructions, and suggested that he issue certificates to be made first lien for, among other things, the "settlement of unavoidable indebtedness of the company now existing." April 2d, 1881, after the coming in of the report of an expert to examine the railroad, and no one appearing, except the receiver's counsel,

the receiver was ordered to issue certificates of indebtedness to the amount of $350,000, and a referee was appointed "to hear and determine all existing claims against the said Lebanon Springs Railroad Company." The receiver had previously borrowed twenty-five thousand dollars without authority of the Court. The disposition made of a portion of the proceeds realized by the sale of the receiver's certificates will be considered later. 373

The Sackett suit did not reach final judgment until Jauuary, 1885, after a delay of between four and five years. Later, in 1885, the referee, under the judgment, sold the property to William Foster, Jr., for $155,000. 374

The action at bar was begun in the Supreme Court of New York, April, 1887, by bondholders owning bonds of both the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company.

The complaint brings in all the parties in interest; it seeks to enforce the foreclosure judgments and decrees of 1872 in the suits instituted by the Union Trust Company of New York, both in Vermont and this State; it is also in the nature of a bill of review of the judgment in the Sackett suit and a bill for relief against the judgment and proceedings in that suit as fraudulent; it also seeks the foreclosure of all junior liens. 375

The Special Term of November 10th, 1891, rendered a judgment for the plaintiffs in this action, a sale of the property was made by the referee, and on the 16th of May, 1892, William Foster, Jr., received a deed as purchaser.

This judgment was affirmed by the General Term of the Third Department.

It now becomes necessary to consider the manner in which this appeal is presented.

In 1886, and before the case at bar was begun,

376 one of the defendants in this action, the Central National Bank of Boston, on behalf of itself and all other holders of the receiver's certificates issued under the judgment in the Sackett suit, brought an action in the Supreme Court of New York against Foster and Hazard, the purchasers under the Sackett judgment, and a corporation called the New York, Rutland and Montreal Railway Company, their grantee. The complaint in this action recited in detail the proceedings in the Sackett suit which led to the issuing of receiver's certificates, alleged that the Central National Bank of
377 Boston held two hundred and fifty thousand dollars, par value, of the same, and that the balance of certificates were owned by divers persons and corporations.

It was also alleged that Hazard and Foster, when purchasing under the Sackett judgment, had assumed and agreed to pay the amount of unpaid principal and interest on said certificates of indebtedness, after application of the purchase money.

It prayed that the certificates be declared a first lien on the property; that a receiver be appointed property sold, and Hazard and Foster adjudged to pay deficiency. This suit was removed into the
378 United States Circuit Court on petition of the defendants, on ground of citizenship of parties.

On the 24th of March, 1887, a decree was entered in favor of plaintiffs, and a sale of the property ordered.

Within thirty days after the entry of this decree the action at bar was begun, and proceeded to judgment before sale under the Federal decree, which did not take place until 1892.

The defendants appealing from the judgment in the action at bar are the certificate holders, and the only questions presented are on their behalf.

It is urged by the learned counsel for the appel-

lants that the judgment appealed from is erroneous 379
in perpetually enjoining the appellants from proceeding with the sale of the premises under the decree of the Circuit Court of the United States; also in authorizing the referee to determine who are the owners of receiver's certificates; also on the merits, and that the motion to dismiss the complaint should have been granted.

The appellants' counsel insists that this case presents a conflict of jurisdiction between the state and federal courts, and that the injunction clause of the judgment which perpetually enjoined and restrained the Central National Bank of Boston 380
and other certificate holders from proceeding with the sale under the United States Circuit Court decree was an unlawful interference with the due and orderly procedure of a suit in which the Federal Court had first acquired jurisdiction of the subject matter. We have been cited to many cases in the State and United States Courts dealing with this question of concurrent jurisdiction and declaring well-settled principles that govern the procedure under such circumstances.

We do not consider that such a question is presented in this case, but are of opinion, assuming 381
that the Sackett suit is fraudulent, that it was competent for the Supreme Court of New York in this action at bar to bring before it all the parties in interest and to review the judgment in the Sackett suit, to vacate it as fraudulent, and to deal as a court of equity with the holders of the receiver's certificates issued under the Sackett judgment. It must be admitted that the United States Circuit Court had jurisdiction of the subject matter in the suit referred to, and that its decree was proper and binding upon the parties before it.

There is nothing in the judgment at bar that

382 attacks the jurisdiction of the United States Circuit Court or questions the legality of its decree.

The suit in the United States Circuit Court was founded upon the judgment and orders in the Sackett suit and sought as against the defendants therein to enforce their provisions and to secure to the certificate holders those rights as to priority of lien and personal judgment against Hazard and Foster, to which the Sackett judgment entitled them.

It was after the decree of the United States Circuit Court was rendered that the Supreme Court
383 of New York, sitting as a court of equity, assumed jurisdiction of all the parties connected with this long and complicated contest and undertook to adjust their rights and interests.

In so doing it rendered its judgment reviewing and reversing the Sackett judgment, setting aside the sale and referee's deed to Hazard and Foster under it, and enjoining the certificate holders from proceeding with the sale under the United States Circuit Court decree.

It is thus apparent that if a court of equity, having jurisdiction of all the parties, was to give complete relief in dealing with the entire subject
384 matter, it must restrain the certificate holders from proceeding with the sale under the decree of the United States Circuit Court, as the foundations of that suit had been utterly swept away by the judgment in the action at bar. Unless this power existed in the Supreme Court of the State of New York, it was powerless to adjust the conflicting interests submitted for its consideration.

We think it is clear, both upon principle and authority, that this power did exist and that the sale under the decree of the United States Circuit Court was without force or effect as to the parties in that suit, as they proceeded in violation of the

injunction contained in the judgment at bar. The 385
setting aside of the judgment in the Sackett suit upon which the suit in the United States Circuit Court was founded for fraud was a new fact occurring since the decree in that court which gave jurisdiction in this action to enjoin proceedings thereon.

Judge Story (2 Eq. Ju., Sec. 899, 13th ed.) uses this language in regard to foreign courts, but it is equally applicable to State and Federal Courts, viz.:

"Although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial 386
limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter may act *in personam* upon those parties, and direct them by injunction to proceed no further in such suit.

"In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction.

"They do not pretend to direct or control the foreign court, but without regard to the situation of the subject matter of the dispute, they consider the equities between the parties and decree *in* 387
*personam* according to those equities and enforce obedience to their decrees by process *in personam*."

This is the acknowledged rule in England and this country.

In the case of *Barry* vs. *Brune*, reported below in 8 Hun, 395, and affirmed by this Court (71 N. Y., 262), this rule was acted upon, and the Supreme Court of this State enjoined the parties before it from collecting a judgment recovered in the United States Circuit Court for the District of Maryland. (See also Mead *vs.* Merritt, 2 Paige, 404; Dehon *vs.* Foster, 4 Allen, 550; Savage *vs.* Allen, 54 N.

388 Y., 458; Harlem R.R. *vs.* Haws, 56 *id.*, 175; N. Y. & N. H. R.R Co. *vs.* Schuyler, 17 How. Pr., 464, 468; Carron Iron Co. *vs.* Maclaren, 5 H. L. C., 439, and English cases there cited.)

Passing from this point it should be remembered that the suit of the Central National Bank of Boston was begun in the Supreme Court of New York, and was removed into the United States Circuit Court on the ground of citizenship of parties.

All that can be claimed for the decree of the latter court is that it be accorded the same force and effect as a similar judgment of the Supreme
389 Court of New York (Dupasseur *vs.* Rocherau, 21 Wall., 130, 135; Crescent Live Stock Co. *vs.* Butcher's Union, 120 U. S., 141, 147). It cannot be doubted that if the Central National Bank of Boston had proceeded to judgment in the Supreme Court of New York that the judgment in the case at bar would have dealt with that judgment precisely as it did with the decree in the United States Circuit Court.

We will now consider the disposition of this case by the Court below on the merits.

An examination of the evidence satisfies us that
390 that the findings of fact are abundantly sustained.

The fifth and sixth findings of fact are to the effect that the suit of Sackett was neither brought nor conducted for the purpose of realizing the property to the owners of the Lebanon Springs bonds, but that it was brought and conducted for the purpose of realizing out of the property certain individual claims of Sackett and Tilden in preference to and at the expense of the other Lebanon Springs bondholders, which claims, if valid, were not liens upon the property and were behind the mortgage. It appears that these claims exceeded thirty thousand dollars, and the aggregate fees of

counsel and receiver were about sixty-one thousand dollars, all of which were paid out of the proceeds realized by the sale of receiver's certificates. 391

The failure to bring in the necessary parties in order to render binding any judgment that might be obtained in the Sackett suit is sufficient of itself to stamp the entire proceeding as colorable and fraudulent. There was in fact no real contest, and the rights of bondholders were ignored.

The absence from the records of the Union Trust Company of New York, of Park, Duncan Hull, Lincoln and the trustees under the other mortgages than those represented by the Union Trust Company renders the Sackett suit a legal absurdity. (Western R.R. Co. *vs.* Nolan, 48 N. Y., 513; Hallett *vs.* Hallett, 2 Paige, 15–22.) 392

We do not deem it necessary to discuss in detail the legal points raised attacking the jurisdiction of the Court and the form of the action.

We think this suit is maintainable under established principles of equity jurisprudence.

The rule is well settled that Courts will set aside as a nullity a judgment, decree or award obtained by fraud. (Hackley *vs.* Draper, 60 N. Y., 88; State of Michigan *vs.* Phœnix Bank, 33 *Id.*, 8; Dobson *vs.* Pearce, 12 *Id.*, 156; Wright *vs.* Miller, 8 *Id.*, 9; Whittlesey *vs.* Delaney, 73 *Id.*, 571; Tiernan *vs.* Wilson, 6 Johns Ch., 411; Campbell *vs.* Railroad Co., 1 Woods, 368.) 393

This action was promptly begun within two years after the sale in the Sackett suit, and is to be regarded as a bill for relief against the Sackett judgment and all proceedings in that suit as fraudulent. It is not necessary to consider it as strictly a bill of review nor to discuss the law bearing upon suits of that nature.

The action was properly and seasonably brought. There is the further question whether the certificate

394 holders have any just ground to complain of the judgment as entered.

By its provisions a referee was appointed to ascertain who were the owners of the Lebanon Springs bonds and which of the bonds were actually in the Sackett suit. It further provided that the referee to sell should pay the net amount realized to the Lebanon Springs bondholders, except that as to the proportions coming to the owners of such bonds as were in the Sackett suit, he should pay so much thereof to the holders of the receiver's certificates, and the balance, if any, to the holders of such bonds.

395 The bondholders of the Lebanon Springs Railroad Co. duly represented in the Sackett suit were, of course, bound by the order and judgment authorizing the issue of ceatificates; the remaining bondholders were in no way affected by the judgment.

It is therefore apparent that the certificate holders have been as fully protected by the judgment in the case at bar as was possible. There are no exceptions that should lead to reversal.

The judgment appealed from should be affirmed, with costs.

396 All concur except GRAY, *J.*, not voting.

Judgment affirmed.

SUPREME COURT OF THE UNITED STATES. 397

THE CENTRAL NATIONAL BANK OF BOSTON and others,
Plaintiffs in Error,

*against*

AARON R. STEVENS and others,
Defendants in Error.

Of October Term in the year of our Lord, one thousand eight hundred and ninety-four. 398

Afterwards, to wit, on the first Monday of October in the same term, before the Justices of the Supreme Court of the United States, at the Capitol in the City of Washington, come the said The Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, by Matthew Hale, their attorney, and say that in the record and pro- 399
ceedings aforesaid, it appears that the judgment aforesaid was given for the said defendants in error against the said plaintiffs in error, whereas, by the law of the land, the said judgment ought to have been given for the said plaintiffs in error, and against the said defendants in error; and also in this, to wit, that said plaintiffs in error claimed that they were entitled in the Court of Appeals of the State of New York, to a reversal of so much of the judgment of the Supreme Court of the State of New York, as adjudged that the plaintiffs in error (defendants in said action) The Central National

Bank of Boston, The Massachusetts Mutual Life Insurance Company, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, and all owners of certificates issued by John W. Van Valkenburgh as receiver of the Lebanon Springs Railroad Company, and each of them, and their and each of their officers, agents, servants and attorneys, are perpetually enjoined and restrained from proceeding with the sale under the degree rendered by the Circuit Court of the United States in and for the Northern District of the State of New York, in the action brought by the said The Central National Bank of Boston against the defendants in said decree, Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and The American Loan and Trust Company of New York, a copy of which decree is attached to the answer of the Central National Bank of Boston in this action, and from suffering said sale to proceed in their or any of their names or behalf; and also, to a reversal of so much of said judgment, as perpetually enjoined and restrained all the owners of any of the certificates above described, as issued by the receiver Van Valkenburgh, and each of them, and their and each of their officers, agents, servants and attorneys from bringing and from proceeding with any action or proceeding in any Court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them; and also, to a reversal of so

much of the said judgment of the Supreme Court 403
of the State of New York, as required the referee named therein, to ascertain, determine and report from the evidence and findings, and such other evidence as might be furnished him, who are the holders of the certificates issued by the said receiver Van Valkenburgh, and how much has been paid upon the same, and authorized and directed the said referee to give notice by advertising, requiring the holders of said certificates to produce the same before the said referee, at his office in Saratoga Springs, or at such other place, and at such other time as he might designate, and make 404
proof as to their title thereto, and the amount due thereon; on the grounds:

1. That the Court below erred in that it did not give due validity and effect to the said decree of the Circuit Court of the United States in and for the Northern District of New York, dated the 24th day of March, 1887, in which the said The Central National Bank of Boston, which sued as well for itself as for all others similarly situated, was complainant, and Rowland N. Hazard, William Foster, Jr., The New York, Rutland and Montreal Railway Company, and the American Loan and Trust 405
Company of New York, were defendants, a copy of which decree is annexed to and made a part of the answer of the said The Central National Bank of Boston in this action.

2. That the said Court also erred in perpetually enjoining and restraining the said plaintiffs in error (defendants in said action) from proceeding with the sale under the said decree of the Circuit Court of the United States above referred to.

3. That the said Court also erred in enjoining and restraining all owners of any of the certificates de-

406 scribed in said judgment as issued by John W. Van Valkenburgh as receiver of the Lebanon Springs Railroad Company, and each of them, and their, and each of their officers, agents, servants and attorneys, from bringing and proceeding with any action or proceeding in any Court whatever, to enforce any lien upon, or for the sale of, or to affect any of the premises, property, franchises and powers in said judgment described, or any interest therein, and from suffering any such action or proceeding to be brought, or to be prosecuted, or to be proceeded with in the names of any of them.

407 4. The said Court also erred in requiring the referee named in the said judgment to ascertain and report from the evidence taken upon the trial in said action, and the findings of the Court, and such other evidence as might be furnished him, who, other than the plaintiffs in said action, are the holders of the bonds issued by the Lebanon Springs Railroad Company and the Harlem Extension Railroad Company, and which of them were represented in the trial of the suit brought by Marvin Sackett, referred to in said judgment.

5. The said Court also erred in providing in the
408 said judgment that the said referee therein named, ascertain, determine and report from the evidence and findings, and such evidence as might be furnished him, who are the holders of the certificates issued by the said receiver, Van Valkenburgh, and how much has been paid upon said certificates, such facts having been found, ascertained and determined by the said Circuit Court of the United States, in and under the decree of the said Circuit Court of the United States, above referred to.

6. The Court below also erred in that by its judgment it required the holders of the said cer-

tificates, including the plaintiffs in error, to pro- 409
duce their certificates before the said referee at his office in Saratoga Springs, or at such other place and at such time as he might designate, and make proof as to their title thereto and the amount due thereon, whereas, the said facts as to the title to said certificates and as to the amount due thereon, had been conclusively ascertained in and pursuant to the said decree of the Circuit Court of the United States above referred to.

7. The Court below also erred in refusing to find as requested by the said plaintiffs in error, that the receiver's certificates issued by John W. Van Val- 410
kenburgh, as receiver, and held by the defendants the Central National Bank of Boston, Peter Butler, as receiver of the property of the Pacific National Bank of Boston, the Massachusetts Mutual Life Insurance Company, and the other persons who have appeared before the Master *pro hac vice* and produced their certificates, are as against all the parties to the action, and all the holders of the said bonds of the Lebanon Springs Railroad Company, including the plaintiff herein, a first lien upon the said railroad and premises described in the complaint as adjudged by the Circuit Court of the 411
United States by its decree in the suit of the Central National Bank of Boston *vs.* Rowland N. Hazard and others, as said certificates have been proved before William Lansing, Esq., the Master *pro hac vice* named in said decree, and as reported by said Master.

8. The Court also erred in refusing to find as requested by the said plaintiffs in error, that if any sale be made under the judgment in said action, such sale should be subject to the rights of the defendant The Central National Bank of Boston, and the other defendants, holders of receiver's certifi-

412 cates (being the plaintiffs in error herein), and that said certificates should be paid to said certificate holders first out of the proceeds of any sale that might be had therein.

And that the said Court of Appeals should have reversed so much of the judgment of the Supreme Court of the State of New York, as in any way impairs the rights of the plaintiff in error or any or either of them under the said decree of the said Circuit Court of the United States, or in any way enjoins, restrains or prevents the plaintiffs in error, or any or either of them, from enforcing the said decree of the said Circuit Court of the United States, or from having and enjoying the full benefit thereof; but that the said Court of Appeals in fact
413 decided the contrary, to the claims and contentions of the plaintiffs in error in the premises, and in all things affirmed the said judgment of the Supreme Court of the State of New York.

And the said Central National Bank of Boston, and the other plaintiffs in error above named, pray that the judgment of the Court of Appeals aforesaid, and the judgment of the Supreme Court of the State of New York aforesaid, so far as it enjoins and restrains the enforcement of the said decree of the Circuit Court of the United States, or in any way impairs the rights of the plaintiffs in error, or of any or either of them, thereunder, or in any way interferes with the due execution and enforcement of the said decree of the Circuit Court
414 of the United States, or impairs the effect thereof, may be reversed, annulled and altogether held for naught, and that they may be restored to all things which they have lost by occasion of the said judgment of the Court of Appeals, and the said judgment of the Supreme Court of the State of New York, affirmed as aforesaid by the said Court of Appeals of the State of New York.

Dated March 7th, 1895.

MATTHEW HALE,
Attorney for Plaintiffs in Error.

THE PEOPLE OF THE STATE OF NEW YORK, BY THE GRACE OF GOD FREE AND INDEPENDENT. 415

*To all to whom these presents shall come or may concern*, GREETING:

KNOW YE, that we having examined the records and files in the office of the Clerk of the Supreme Court in the County of Albany, do find two certain final orders there remaining, both of which were filed on the twenty-third of September, 1895, in the words and figures here next following, all of which we have caused to be exemplified and the seal of our Supreme Court to be affixed. 416

Witness, the Honorable Judson S. Landon, a presiding Justice of our Supreme Court at Schenectady.

417

418 At a Special Term of the Supreme Court, held at the Chambers of Mr. Justice Herrick, in the City of Albany, on the second day of April, 1893.

Present—Hon. D. CADY HERRICK.
Justice.

AARON R. STEVENS, IDA S. HARRISON and others,

419 *against*

THE UNION TRUST COMPANY OF NEW YORK, The Central National Bank of Boston, The Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert, Sarah Gilbert, and others.

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An application having been made to the Court, upon the return twenty-third of March, 1893, continued to this time, of an order to show cause why the defendants, the Central National Bank of Boston, the Massachusetts Mutual Life Insurance Company, Mary Strait, William C. Van Alstyne, Esther K. Carter, Calvin Allen, Cyrus L. Loutrell, Louisa M. G. Wright, Francis A. White, Mary Gilbert and Sarah Gilbert, should not be punished for contempt for their disobedience of that part of the judgment in this action which perpetually enjoined

and enjoins them from proceeding with the sale 421
under the decree in the action brought by the Central National Bank of Boston against Hazard and Foster, and from suffering said sale to proceed in the name or behalf of either of them, and on reading and filing the said order to show cause granted by Mr. Justice Herrick on the nineteenth of March, 1893, the affidavits of Ida S. Harrison, Edward Winslow Paige and John Kreger, verified seventeenth and eighteenth of March, 1893, and two affidavits of Matthew Hale verified twenty-second of March, 1893, and second of April, 1893, and after hearing Mr. Paige for the plaintiffs in support of the appli- 422
cation and Mr. Hale for the above-named defendants opposed, and it appearing to the Court and the Court having found that none of the above-named defendants has in any way disobeyed said injunction nor anything in said jndgment, it is

Ordered that the said application be and is denied and these proceedings dismissed.

D. CADY HERRICK,
Jus. Sup. Ct.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss.:

I, JAMES D. WALSH, Clerk of the said City and 423
County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify, that I have compared the annexed copy order with the original thereof, filed in this office on the 23d day of September, 1895, and that the same is a correct transcript therefrom and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed my official seal this 23d day of September, 1895.

JAS. D. WALSH,
[L. S.] Clerk.

424 At a Special Term of the Supreme Court held at the Chambers of Mr. Justice Herrick in the City of Albany, on the nineteenth day of September, 1895.

Present—Hon. D. CADY HERRICK,
Justice.

AARON R. STEVENS and IDA S. HARRISON and others

*against*

425

THE UNION TRUST COMPANY OF NEW YORK, PETER BUTLER, as Receiver of the Pacific National Bank of Boston, and others.

An application having been made to the Court on the return, twenty-third of March, 1892, continued to the second day of April, 1892, of an order to show cause to punish the defendant Peter Butler for contempt of the judgment in the action by his disobedience of that part of the judg-
426 ment which perpetually enjoined him from proceeding with the sale under the decree in the action brought by the Central National Bank of Boston against Hazard and Foster, and from suffering the said sale to proceed in his name or behalf, in that he has directed the referee in that action to proceed with such sale, and has applied to the Court for an order to compel the referee to proceed with such sale, and on reading and filing the said order to show cause granted by Mr. Justice Herrick on the nineteenth March, 1893, the affidavit of Ida S. Harrison, verified seventeenth March, 1893, the

affidavits of Edward Winslow Paige and John Kreger, both verified seventeenth March, 1893, the affidavit of Edward Winslow Paige, verified twenty-sixth March, 1893, the affidavit of Worthington Frothingham, verified second of April, 1893, and the opinion of Judge Wallace upon the aforesaid application of Peter Butler, and after hearing Mr. Paige for the plaintiffs in support of the application and Mr. Hale for Mr. Butler, opposed, and it appearing to the Court that the said Peter Butler has died, it is 427

Ordered, that the said application be and is hereby denied and the proceedings dismissed. 428

D. CADY HERRICK,
Jus. Sup. Ct.

STATE OF NEW YORK,
City and County of Albany, Clerk's Office, } ss.:

I, JAMES D. WALSH, Clerk of the said City and County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, do hereby certify, that I have compared the annexed copy order with the original thereof, filed in this office on the 23d day of Sept., 1895, and that the same is a correct transcript therefrom and of the whole of said original. 429

In testimony whereof, I have hereunto set my hand and affixed my official seal this 23d day of Sept., 1895. [SEAL.]

JAS. D. WALSH,
Clerk.

I, JUDSON S. LANDON, a presiding Justice at a Special Term of the Supreme Court of New York for the County of Schenectady, a County adjoining to the County of Albany, do certify that James D. Walsh, whose name is subscribed above, was on the twenty-third of September, 1895, the Clerk of the Supreme Court for the County of Albany; that full faith and credit are due to his official acts; that the seal above affixed is the seal of our said Supreme Court, and that the attestation thereof is in due form.

Dated Schenectady, fourth of November, 1895.

J. S. LANDON,
Justice Supreme Court.

STATE OF NEW YORK, }
County of Schenectady, } ss.:

I, JAMES B. ALEXANDER, Clerk of the Supreme Court of New York for the County of Schenectady, do certify that the Honorable Judson S. Landon, whose name is subscribed to the preceding certificate, is Presiding Justice at a Special Term of the Supreme Court in the County of Schenectady, duly elected and sworn; that the signature by said Justice to said certificate is genuine, and that the County of Schenectady is adjoining to the County of Albany.

In testimony whereof, I have set my hand and affixed the seal of the said Court the sixth day of November, 1895.

[SEAL.]

J. B. ALEXANDER,
Clerk.